88-263

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION, PETITIONER

v.

SHEILA ANN GLENN, PATRICIA F. JOHNS AND ROBBIE NUGENT, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CHARLES A. POWELL, III
BARRY V. FREDERICK
Powell, Tally & Frederick
Suite 700
New South Federal Bldg.
21 First Avenue North
Birmingham, AL 35203
(205) 324-4996

DAVID M. DAVIS
MARK R. FLORA
General Motors Corporation
Office of General Counsel
3031 West Grand Boulevard
Detroit, MI 48202
(313) 556-5000

KENNETH S. GELLER *
STEPHEN M. SHAPIRO
JAMES D. HOLZHAUER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Plaintiffs, who are female employees of General Motors Corporation ("GM"), sued GM under the Equal Pay Act, claiming that they were paid less than their male counterparts for doing the same work. GM demonstrated that the pay differentials were due to its practice of retaining the pay level of employees who transfer from hourly-wage jobs to lower-paying salaried positions within the company. The court of appeals held that this practice was not based on a "factor other than sex" under the Act, 29 U.S.C. § 206(d).

The questions presented are:

1. Whether an employer's practice of maintaining the pay level of employees who transfer between jobs in a company is a practice lawfully based on a "factor other than sex" under the Equal Pay Act.

2. Whether an employer's utilization of such a practice may be characterized as a "willful" violation when the employer relied on a widely-accepted interpretation of the Equal Pay Act subsequently rejected by the court of appeals.

3. Whether an employer's utilization of such a practice may be characterized as "bad faith" conduct when the employer's representatives were found by the district court to have acted in the "good faith belief" that they were adhering to lawful company policy.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

The caption includes all of the parties to the proceeding.

The affiliates and subsidiaries of General Motors Corporation, other than wholly-owned subsidiaries, are listed in App. G, *infra*, 57a-58a.

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General Motors Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 841 F.2d 1567. The initial opinion of the district court (App., *infra*, 20a-34a) and its subsequent opinion on motion for attorneys' fees (App., *infra*, 35a-49a) are reported at 658 F. Supp. 918.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1988 (App., *infra*, 50a-51a). Pursuant to an order issued by Justice Kennedy, the time for filing a petition for a writ of certiorari was extended to and in-

cluding August 13, 1988 (App., *infra*, 52a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The Equal Pay Act, 29 U.S.C. § 206(d), Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), and Sections 6(a) and 11 of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. §§ 255(a) and 260, are set forth at App., *infra*, 53a-56a.

STATEMENT

This case involves the common employment practice of allowing employees who transfer from a higher-paying job to a lower-paying job within the same company to retain the level of pay they received in their former job. Employers follow this practice, often called "rate (or wage) retention" or "income maintenance," for a variety of legitimate reasons: to encourage transfers (particularly to supervisory or salaried positions), to maintain employee morale, to enable minority employees to move into job lines with greater promotional opportunities, to develop a more flexible work force with a greater variety of skills, to retain skilled employees who may be needed in the future, to ease the burden on employees during times of economic contraction, and to accommodate workers who are no longer able to perform their previous jobs.

General Motors Corporation ("GM") pays employees who transfer from hourly wage jobs to lower-paying salaried positions at least as much as they previously earned. Because that sex-neutral practice fortuitously resulted in a disparity between the wages received by men and women in one nine-employee job unit at GM's facilities at Athens, Alabama, the court of appeals held that GM violated the Equal Pay Act. The court below reached this conclusion even though it made no finding that sex played any role whatsoever in the company's employment, compensation or transfer decisions. Beyond

this, the court of appeals held that GM's violation was "willful" (*i.e.*, in reckless disregard of its legal obligations), even though it conformed to the decision of the only other court of appeals to have decided the issue and to the rulings of several district courts. Finally, the court of appeals held that GM acted in "bad faith," even though the district court expressly held that the company officials who made the pay decisions had a good-faith belief they were following a lawful company policy.

1. This action was brought by three female plaintiffs employed as salaried "follow-up" workers in the Materials Management Department of three GM plants near Athens, Alabama. The three-plant department had a total of nine follow-up workers. Follow-up workers were responsible for ensuring that an adequate supply of tools and operating materials were on hand. They ordered needed tools and materials, dealt with salespersons, managed inventories, and made special or "emergency" purchases for their plants. App., *infra*, 3a, 21a.

The three plaintiffs and the male employees with whom they were compared in this litigation arrived at their follow-up jobs through distinctly different routes. All but one of the men transferred to their jobs from higher-paying hourly wage positions. App., *infra*, 22a-25a. They thus benefitted from GM's practice of paying employees who transfer from hourly wage jobs to salaried positions at least the amount they had earned previously.[1] By contrast, plaintiff Robbie Nugent was hired "off the street" as a follow-up worker and accordingly began at the bottom of the salary scale for the job. The other two plain-

[1] One of the seven male comparators, Steven D. Greenlee, had not been working for GM when it hired him as a follow-up worker in April 1979. Greenlee had been employed by a GM supplier and was hired to purchase the parts he had previously supplied. His special skills and expertise warranted a higher salary. Tr. Vol. 2 at 69-70; Tr. Vol. 3 at 106. "Tr." references are to the trial transcript in the district court.

tiffs, Sheila Glenn and Patricia Johns, transferred to follow-up jobs from relatively low-paying salaried positions as stenographer and secretary. *Id.* at 21a-22a. None of the employees, male or female, who transferred to follow-up jobs from other positions at the company suffered a reduction in pay. Most received a small increase. The largest increase (10%) was received by a woman, plaintiff Glenn. *Id.* at 22a.[2]

GM officials testified that the compensation of the employees who transferred from hourly wage jobs to salaried follow-up positions was set in accordance with a longstanding, sex-neutral, company-wide practice of paying such employees at least as much as they made in their hourly jobs. Although there was no formal written document establishing or describing the practice, it was acknowledged and discussed in a 1975 Report of the company's Personnel Analysis Group. Defendant's Exhibit No. 2, at 18-19. The purpose of GM's practice was to encourage employees to move into salaried positions; management officials understandably believed that employees would be reluctant to transfer if that resulted in a cut in pay. App., *infra*, 28a.

Thus, some follow-up workers were paid more than plaintiffs because they transferred to their jobs from higher-paying hourly wage positions, while plaintiffs were either hired "off the street" at the bottom of the salary

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[2] The district court opinion indicates that the monthly salaries of men who transferred from hourly jobs to salaried follow-up positions changed as follows: Stephen Downs, salary increased from $932.35 to $975.00 per month (4.5%); Harold Wales, first transfer, from $1,216.57 to $1,230.00 (1%); Robert Stephenson, first transfer, $1,171.51 to $1,220.00 (4.1%); Billy White, $1,608.22 to $1,656.46 (2.9%). App., *infra*, 23a-24a.

Of the two women who transferred from salaried clerical positions to salaried follow-up jobs, the court gave the pre- and post-transfer salary of only one, Sheila Glenn. Her salary was increased from $1,310.40 to $1,441.44 (10%). App., *infra*, 22a.

scale (and worked up from there) or transferred from lower-paying clerical positions. App., *infra*, 21a-25a. In this instance, the follow-up workers who transferred from higher-paying jobs were men; plaintiffs, whom GM hired "off the street" or who transferred from lower paying jobs, were women. In other job categories, however, female employees received the benefit of GM's practice and earned higher pay than their male counterparts. Tr. Vol. 3 at 99-102. By focusing on the effect of GM's sex-neutral practice on only a single small department, plaintiffs alleged that the practice resulted in men illegally being paid more than women.

2. Plaintiffs brought this action in the United States District Court for the Northern District of Alabama in October 1983, claiming that GM paid them less than men doing equal work, in violation of the Equal Pay Act, 29 U.S.C. § 206(d).[3] The district court found that plaintiffs had established a prima facie case by showing that they did equal work as follow-up employees but received less pay than men in the same job. App., *infra*, 28a.

The district court rejected GM's affirmative defense that the pay disparity was due to a "factor other than sex" (29 U.S.C. § 206(d)(1)(iv)—namely, the company's sex-neutral practice of not requiring employees to take a pay cut when transferring from hourly wage jobs to salaried positions. Significantly, the court did *not* find that GM's compensation decisions were based on sex. To

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[3] The district court issued its original Opinion and Order on July 10, 1986, resolving all issues except the computation of damages and attorneys' fees and plaintiffs' entitlement to prejudgment interest. App., *infra*, 20a-32a. On February 4, 1987, the district court issued an addendum to its Opinion and Order. *Id.* at 35a-49a. The addendum discusses and decides several other issues, including the statute of limitations and liquidated damages. We will refer to the district court's July 10, 1986 opinion as its "initial opinion" and to the February 4, 1987 opinion as its "subsequent opinion."

the contrary, the court expressly concluded that the individual GM officials who made the pay decisions "held a good faith belief that General Motors had adopted a 'transfer pay policy.' " App., *infra*, 40a. The court nonetheless held that GM violated the Equal Pay Act, noting that its transfer pay policy "is not in writing" and "is in fact not a policy at all, but merely one aspect of a practice. In practice GM simply pays Follow-Ups what it takes to induce them to accept the employment." *Id.* at 28a.

The district court then turned to the question of the applicable statute of limitations. 29 U.S.C. § 255(a) provides for a two-year limitations period, except that "a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." In its initial opinion, the district court applied the "in the picture" test established in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), cert. denied, 409 U.S. 948 (1972), and held that GM's violation was willful because the company knew that the Equal Pay Act was "in the picture." App., *infra*, 30a-31a. In its subsequent opinion, the court noted that even if it were to apply the "reckless disregard" standard of *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985), it would find that the violation was willful because GM ignored unidentified "clear signs that its practices were illegal. A violation rises to the level of reckless disregard when an employer has the resources to conform its conduct to the law, but declines to make the effort." App., *infra*, 38a-39a (footnote omitted).

In addition, the district court held that plaintiffs were entitled to double the amount of their actual losses under the liquidated damages provisions of 29 U.S.C. §§ 216(b) and 260. In its initial opinion, the district court declined to award double damages because "GM's violation of the Equal Pay Act, while 'willful' * * *, was in good faith and predicated upon reasonable grounds. * * * GM knew

that their conduct was governed by the Equal Pay Act, but created the pay disparity concerning plaintiffs in good faith believing the disparity justified on the basis of their hourly transfer pay 'policy.'" App., *infra*, 31a-32a. But in its subsequent opinion, the district court modified its order and awarded liquidated damages. The court held that the good faith exception to Section 260 did not apply and that it "ha[d] no choice but to award liquidated damages," because GM "adduced neither case law nor administrative rulings to demonstrate that there were reasonable grounds to support a belief that its acts were in conformity with the law." *Id.* at 41a.

3. The court of appeals affirmed the district court's decision with respect to liability and damages under the Equal Pay Act. The court of appeals held that GM's practice was not properly based on a "factor other than sex" within the meaning of 29 U.S.C. § 206(d)(1)(iv). Although it did not disturb the district court's fact finding that GM officials made the pay decisions in "good faith" based on what they believed to be a company policy of not reducing wages when hourly employees transfer to a salaried position, the Eleventh Circuit held that "prior salary alone cannot justify pay disparity." App., *infra*, 9a. The Eleventh Circuit narrowly limited the statutory "factor other than sex" defense to situations where "the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business." *Id.* at 8a.

In holding that GM could not justify salary disparities on the basis of prior compensation, the court of appeals acknowledged that its decision "contradict[ed] the Seventh Circuit's holding in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 146 (1987)." The Eleventh Circuit stated, however, that GM's defense in this case, and the Seventh Circuit's approval of an employer's "sex-

neutral policy of maintaining an employee's salary upon a change of assignment," impermissibly depended on a "market force theory to justify the pay disparity and * * * ignored congressional intent as to what is a 'factor other than sex.' " App., *infra*, 9a.

The court of appeals also concluded that GM's violation of the Equal Pay Act was willful and that the three-year statute of limitations applied under the *Jiffy June* "in the picture" standard. App., *infra*, 10a-12a. In the alternative, the court held that, even under the *Thurston* "reckless disregard" standard, the violation was willful because "GM sought to rely on the market force theory, a theory long discredited by this Court and the Supreme Court." *Id.* at 13a. On the same grounds, the court below held that GM's actions were not taken in good faith and that plaintiffs therefore were entitled to liquidated damages as a matter of law. *Id.* at 13a-14a.

REASONS FOR GRANTING THE PETITION

When Congress enacted the Equal Pay Act in 1963, some employers paid women less than men for the same work simply because they were women. The Act was designed to prohibit that unfair and intolerable practice. But it was not intended to be a sweeping regulation of employment practices generally. Thus, the Act prohibits only wage discrimination, not discrimination in hiring or promotions or any other form of employment discrimination. And it prohibits only wage discrimination based on sex, not legitimate sex-neutral practices that in particular instances may result in lower pay for some female employees. The Equal Pay Act does not require that all employees doing the same work receive the same compensation. It simply prohibits pay inequalities based on sex.

The Eleventh Circuit's decision in this case wrenches the Equal Pay Act from its foundations, ignores its plain language and legislative history, and threatens to disrupt

a longstanding, sex-neutral employment practice utilized by both large and small employers (including the federal government) nationwide. Moreover, the decision below invalidating GM's transfer pay practice conflicts with the Seventh Circuit's construction of the Act and with numerous district court rulings. Finally, the court of appeals' conclusion that GM's conduct was "willful" and "in bad faith" is flatly inconsistent with a recent decision of this Court. It is essential that the Court grant the petition for a writ of certiorari to resolve these conflicts and to prevent the needless destruction of an important and widespread employment practice of benefit to employers and employees alike.

I. The Court Of Appeals' Construction Of The Equal Pay Act Is Incorrect And Conflicts With The Decisions Of This Court And Of Other Courts Of Appeals

A. *The court of appeals erred in rejecting GM's "factor other than sex" defense.*

1. The Equal Pay Act, 29 U.S.C. § 206(d), prohibits employers from discriminating "on the basis of sex" by paying unequal wages to men and women doing equal work. To reinforce the fact that the Act only prohibits wage discrimination based on sex, Congress listed four affirmative defenses. Differences in pay do not violate the Act when they are

> made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on *any other factor other than sex.*

29 U.S.C. § 206(d)(1) (emphasis added).

The legislative history of the Equal Pay Act makes it abundantly clear that the "factor other than sex" exception was intended to be "a general catchall provision," *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 196 (1974), designed to ensure that the Act penalized em-

ployers only for making distinctions based on sex. As the House Report explained:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included.

H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963). Representative Griffin, one of the principal supporters of the bill, made the same point in commenting on the fourth exception during the debates on the Act:

> [R]oman numeral iv * * * makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation. In other words, even though jobs involve the same skill, equal effort, equal responsibility, and are performed under the same working conditions, *if there is any other factor not based on sex upon which a differential is based, then no violation of this law can be found.*

109 Cong. Rec. 9203 (1963) (emphasis added). The Senate Report reiterated Congress's firm understanding that the Act only prohibited pay disparities based on sex:

> S. 1409 is designed to eliminate any wage rate differentials which are based on sex. Neither the committee nor anyone proposing equal-pay legislation intends that other factors cannot be used to justify a wage differential.

S. Rep. No. 176, 88th Cong., 1st Sess. 4 (1963).

The language and legislative history of the statute thus confirm that an employer does not violate the Act when pay disparities that may appear to burden one sex more than another are based on any "factor other than sex." As this Court remarked in contrasting the Equal

Pay Act with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

County of Washington v. *Gunther*, 452 U.S. 161, 170 (1981). Therefore, under the Equal Pay Act, courts are not permitted to "substitute their judgment for the judgment of the employer" and should not "judge the reasonableness or unreasonableness of [an employer's] differentiation among employees, except as it shows a clear pattern of discrimination" based on sex. 109 Cong. Rec. 9209, 9208 (1963) (remarks of Rep. Goodell, a "principal exponent on the Act"). *See County of Washington* v. *Gunther*, 452 U.S. at 170-171.

From the beginning, it was contemplated that the "factor other than sex" defense would encompass transfer pay practices similar to the one involved in this case. For example, the House Report expressly stated that the defense

> recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not un-

> common for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

H.R. Rep. No. 309, *supra*, at 3. Similarly, a regulation promulgated by the Department of Labor shortly after passage of the Equal Pay Act recognized "red-circling" as a factor other than sex. The regulation stated that "[u]nder the 'red circle' principle the employer may continue to pay the employee his or her present salary, which is greater than that paid to the opposite gender employees, for the work both will be doing." 29 C.F.R. § 1620.26(a).

The Eleventh Circuit's decision conflicts with this accepted understanding of the Equal Pay Act and contradicts the very concept of "wage retention," of which "red-circling" is but one example. The court below stated that it would allow such practices *only* "when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business." App., *infra*, 8a. Uniform transfer pay practices, including "red-circle" rates, however, are by definition anomalous and unrelated to the job in question or the employee's ability to perform the job. Indeed, the federal regulation concerning "red-circle" rates gives a specific example that would not meet the Eleventh Circuit's definition: an employee who is transferred to a lower-paying job because he is no longer able to perform his previous job due to ill health. 29 C.F.R. § 1620.26(a). In that case, as in most other transfer pay situations, the disparity in pay is due not to the characteristics of the job or the individual employee's experience, training or ability, but rather to the personal circumstance of the employee being transferred. Unless that personal circumstance is based on sex, such differential treatment does not violate the Equal Pay Act.

2. In light of the statutory language, the legislative history and the applicable federal regulation, it is hardly surprising that the only court of appeals previously to decide the very issue presented in this case held that an employer's "salary retention policy qualifies as a factor other than sex." *Covington* v. *Southern Illinois University*, 816 F.2d 317, 322 (7th Cir.), cert. denied, 108 S. Ct. 146 (1987). In that case, the plaintiff claimed that the university paid her less than it paid her male predecessor in the position of art advisor. The university admitted the pay disparity, but contended that the former art advisor had transferred to that position from a higher-paying teaching position. The university followed the practice of not reducing the pay of faculty members who transferred to lower-paying jobs.

The Seventh Circuit held that the university's employment practice did not violate the Equal Pay Act, rejecting the claim that "factors other than sex * * * are limited either to business-related reasons or, more narrowly, to factors that relate to the requirements of the job or to the individual's performance of that job." 816 F.2d at 321. The court held that the Act does *not* prohibit salary differentials based on the previous salary paid by the same employer, "unless this policy is discriminatorily applied or unless there is evidence independent of the policy which establishes that the employer discriminates on the basis of sex." *Id.* at 323.

The Eleventh Circuit reached precisely the opposite conclusion in this case. Even though there was no finding that GM's transfer pay policy was discriminatorily applied or that pay rates for "follow-up" positions were set on the basis of sex, the Eleventh Circuit held that GM's practice violated the Equal Pay Act. Even though the Act expressly permits pay differentials based on any "factor other than sex," the Eleventh Circuit flatly held that "prior salary alone cannot justify pay disparity." App., *infra*, 9a. And even though Congress designed the

"factor other than sex" defense to be a broad, "catchall provision," the Eleventh Circuit announced that it "applies [only] when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business." *Id.* at 8a. In sum, even though the Act clearly was intended to permit nondiscriminatory wage practices, the Eleventh Circuit concluded that GM violated the Act simply because, in one small department, its sex-neutral transfer pay practice fortuitously resulted in men being paid more than women.

In all of these respects, the Eleventh Circuit's construction of the Equal Pay Act is in direct conflict with the Seventh Circuit, as the court below conceded (App., *infra*, 9a):

> We recognize that our holding may contradict the Seventh Circuit's holding in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.) * * *. The flaws of the *Covington* decision are that the Seventh Circuit implicitly used the market force theory to justify the pay disparity and that the Seventh Circuit ignored congressional intent as to what is a "factor other than sex." Consequently, we reject *Covington* because it ignores that prior salary alone cannot justify pay disparity.

3. The Eleventh Circuit's assertion that the *Covington* decision, or GM's defense in this case, relied on the "market force theory" is inexplicable. The market force theory holds that it is permissible to pay women less than men because they are willing to work for lower wages. See *Corning Glass Works* v. *Brennan*, 417 U.S. at 204-205. But Southern Illinois University did not pay the male art advisor more than it paid Covington because she was willing to work for less. It paid him more because he had transferred from a higher-paying job, just as it would have continued to pay Covington her higher salary if

she had transferred to a lower-paying job. By the same token, GM did not pay plaintiffs less than their male counterparts because they were willing to work for lower wages. Rather, it paid them less because the men happened to have transferred from higher-paying hourly jobs, just as it paid women more than their male counterparts when those women transferred from hourly jobs to lower-paying salaried positions. GM's practice thus bears no resemblance to the discredited market force theory, and GM has never relied on that theory.

The district court and, to a lesser extent, the court of appeals also relied on the fact that GM did not show that it had a consistent, company-wide, written policy of not reducing wages when hourly employees transferred to salaried positions. Instead, the courts found, individual company officials declined to reduce the pay of the hourly workers because they believed, in good faith, that such a policy existed. See App., *infra*, 7a & n.8, 38a-39a n.4.[4] But whether the pay decisions were made pursuant to company policy (as GM maintains) or in accordance with the good-faith belief of individual officials that such a policy existed (as the courts below found), the undisputed fact is that the pay decisions were based on the prior salary of the transferred workers and were *not* based on sex. Accordingly, the practice did not violate the Equal Pay Act.

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[4] Petitioner does in fact have such a policy. The testimony of GM officials involved in setting salaries, Tr. Vol. 3 at 94-95, 198, and defendant's Exhibit No. 2, a 1975 internal GM report discussing the transfer pay policy, demonstrate the existence of a clear, consistently enforced, unwritten policy. The legislative history of the Equal Pay Act emphasizes that a practice or policy need not be in writing to qualify as a "factor other than sex." See 109 Cong. Rec. 9203, 9208 (1963) (statements of Reps. Griffin, Fountain, Goodell and Waggoner).

4. Whether employment practices such as that followed by GM in this case are properly based on a "factor other than sex" under the Equal Pay Act is a frequently-recurring question of federal law. The Eleventh Circuit's decision conflicts not only with the Seventh Circuit's decision in *Covington* but also with decisions of several district courts on similar issues. See *Groussman* v. *Respiratory Home Care, Inc.*, 40 Fair Empl. Prac. Cas. (BNA) 122, 123, 125-126 (C.D. Cal. 1986); *Derouin* v. *Louis Allis Div.*, 618 F. Supp. 221, 223-225 (E.D. Wis. 1984) (the employer's practice of limiting promotional salary increases to "a specified percentage (10%-20%) of the employee's present salary" was based on a factor other than sex); *Grove* v. *Frostburg Nat'l Bank*, 549 F. Supp. 922, 937 (D. Md. 1982) (the "practice of not reducing salaries when employees were transferred or their job assignments changed" was based on a factor other than sex); *EEOC* v. *Samedan Oil Corp.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,901 at 26,268 (E.D. Okla. 1982) (a "company policy not to reduce salaries when employees are demoted from a higher paying job to a lower paying one" rested on a factor other than sex); *Mangiapane* v. *Adams*, 20 Fair Empl. Prac. Cas. (BNA) 699, 700-701 (D.D.C. 1979), affirmed, 24 Empl. Prac. Dec. (CCH) (D.C. Cir. 1980) (a federal government decision to "red-circle" employees when their positions were downgraded from GS-13 to GS-12 was based on a factor other than sex); *Marshall* v. *Liggett & Myers, Inc.*, 22 Empl. Prac. Dec. (CCH) ¶ 30,591 at 14,184 (M.D.N.C. 1979), affirmed in part and vacated in part on other grounds, 690 F.2d 1072 (4th Cir. 1982) (a "company's practice of continuing to pay the same wage to employees who transfer from higher to lower paying positions" was based on a factor other than sex). See also *Adams* v. *University of Washington*, 106 Wash. 2d 312, 722 P.2d 74, 77-82 (1986) (interpreting state legislation "virtually identical to" the Equal Pay Act to hold that an employer's practice of not reducing the salaries of printers whose skills had

become obsolete when they were transferred to lower-paying jobs was a factor other than sex).

Beyond this, the Eleventh Circuit's decision cannot be reconciled with the reasoning of the Ninth Circuit in *Kouba* v. *Allstate Ins. Co.*, 691 F.2d 873 (1982), or the Fourth Circuit in *EEOC* v. *Aetna Ins. Co.*, 616 F.2d 719 (1980). In *Kouba*, the employer argued that its policy of considering the previous salary paid to employees by *another* employer justified a pay disparity. In such a case, it is of course far more difficult for the new employer (or for a court) to determine whether the prior salary itself was based on sex. Nevertheless, the Ninth Circuit held that "the Equal Pay Act does not impose a strict prohibition against the use of prior salary." *Id.* at 878. The Ninth Circuit determined that in order to find that Allstate's use of prior salary violated the Act, "the [district] court must find that the business reasons given by Allstate do not reasonably explain its use of that factor * * *." *Ibid.*

In this case, there was *no* finding that GM took sex into account in setting salaries, approving transfers, or deciding whether to continue to pay a transferred employee at his or her previous wage rate. Yet the Eleventh Circuit rejected the company's defense without even considering whether "the business reasons given by [GM] reasonably explain its use of [prior salary]." *Kouba* v. *Allstate Ins. Co.*, 691 F.2d at 878. GM stated that it followed its transfer pay practice in order "to encourage people to move out of hourly wage jobs into salaried tracks * * *." App., *infra*, 6a. Consistent with the Ninth Circuit's ruling, the Eleventh Circuit should have considered whether GM's stated reason reasonably explained its practice. The court below refused to do so and instead flatly held that "prior salary alone cannot justify pay disparity." *Id.* at 9a.

In *EEOC* v. *Aetna Ins. Co.*, a six-year employee claimed that the company paid a newly-hired man more

than it paid her for the same work. The employer contended that the pay disparity was justified on two grounds. First, the company asserted that it had "two distinct and separate merit systems: one for incoming employees; and another for persons already employed at the company." 616 F.2d at 722. The system for incoming employees was regularly reviewed and upgraded in order to attract the best prospects, but the system for existing employees was not regularly readjusted. Second, the employer contended that the man's higher salary was justified by his "ability and more substantial prior underwriting and managerial experience * * *." *Ibid.*

The Fourth Circuit held that both of the employer's justifications were "factor[s] other than sex" under the Equal Pay Act. It concluded that "the differential was attributable to the existence of two distinct salary programs" and "by [the man's] experience and background * * *." 616 F.2d at 726. In this case, GM also had separate pay systems, one for hourly employees, and the other for salaried employees. Because neither system was based on sex, the Eleventh Circuit's holding that GM violated the Act is inconsistent with the Fourth Circuit's holding that Aetna did not violate the Act.

This disagreement between the Eleventh Circuit and numerous other courts on a recurring and important question of federal law requires this Court's resolution. As we explain at pages 23-26, *infra*, the unsettled state of the law casts doubt upon a sex-neutral employment practice common throughout the United States. Companies such as GM, with operations nationwide, are in a particularly difficult position when their practices appear to violate federal law in one circuit but to be lawful in others. This Court should grant review to settle the matter.

B. *The court of appeals' application of a three-year statute of limitations conflicts with this Court's decision in Richland Shoe.*

The Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act ("FLSA"), and the procedural and remedial provisions of the latter Act apply. 29 U.S.C. § 255(a) provides that Equal Pay Act cases must be brought "within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."

Prior to this Court's recent decision in *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. 1677 (1988), there was a conflict among the circuits as to the meaning of the term "willful" in Section 255(a). Several circuits applied the standard first articulated by the Fifth Circuit in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (1971), cert. denied, 409 U.S. 948 (1972), which regarded a violation as willful if the employer knew that the federal Act was "in the picture." Other courts followed the approach established by this Court in a different context in *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985), which considered a violation to be willful only if the employer " 'knew or *showed reckless disregard for the matter of whether* its conduct was prohibited by the FLSA.' " *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. at 1680 (emphasis in the original).

Last Term, this Court rejected the *Jiffy June* standard and held that the *Thurston* "reckless disregard" standard applied to FLSA cases. *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. at 1682. The Court emphasized that neither negligence nor unreasonableness is enough to meet this standard of willfulness. Thus, the Court expressly rejected a definition proposed by the Secretary of Labor that would have "permit[ted] a finding of willfulness to be based on nothing more than negligence, or, perhaps, on a completely good-faith but incorrect assumption that a

pay plan complied with the FLSA in all respects." *Ibid.* As the Court explained (*id.* at 1682 n.13):

> If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful under either [the Secretary's] test or under the standard we set forth. If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under [the Secretary's] test, it should not be so considered under *Thurston* or the identical standard we approve today.

The lower courts in this case, acting prior to the *Richland Shoe* decision, applied the now-repudiated *Jiffy June* "in the picture" standard and held that GM's conduct was willful. App., *infra*, 12a, 31a. That ruling is plainly no longer tenable. In the alternative, the courts also held that GM's conduct was willful under the *Thurston* standard, but in doing so they clearly misconstrued that standard. First, the district court held, and the court of appeals agreed, that GM acted recklessly under *Thurston* because it did not

> make a "reasonable effort to determine whether the plan [it was] following would constitute a violation of the law." * * * General Motors chose to ignore clear signs that its practices were illegal. A violation rises to the level of reckless disregard when an employer has the resources to conform its conduct to the law, but declines to make the effort.

App., *infra*, 37a-39a (footnotes omitted); see also *id.* at 13a. Second, the court of appeals held that GM violated the "reckless disregard" standard because it "sought to rely on the market force theory, a theory long discredited by this Court and the Supreme Court." *Ibid.*

These interpretations of the *Thurston* "reckless disregard" standard cannot be squared with this Court's subsequent ruling in *Richland Shoe*. The Court made it crystal clear in *Richland Shoe* that an employer does *not*

act "willfully" simply because it has not made a reasonable effort to determine its legal obligations. 108 S. Ct. at 1682 & n.13. Indeed, it is completely anomalous to hold, on the one hand, that GM acted willfully and recklessly while acknowledging, on the other hand, that its legal position was accepted by *the only appellate decision to consider the very issue.* See App., *infra*, 9a. The Eleventh Circuit's finding of "reckless disregard" is even more untenable given the support for GM's legal position in the decisions of several other courts. See cases cited at page 16, *infra;* see also *Blocker* v. *AT & T Technology Systems*, 666 F. Supp. 209, 214 (M.D. Fla. 1987) ("[d]efendants' policy of paying transferred, qualified employees whose position has been eliminated their previous salary is not based upon sex * * * and * * * fits within the 'factor other than sex' exception to the Equal Pay Act").

In fact, the Eleventh Circuit held that GM recklessly disregarded its legal obligations even though no other federal court had ever held that a transfer pay practice like GM's was unlawful. And it held that GM acted recklessly even though there was no evidence of reckless conduct in the record. To the contrary, the record demonstrates—and the district court twice found (App., *infra*, 31a, 40a)—that GM officials acted in the good faith belief that they were following a valid company policy. A holding that such conduct is "reckless" would "permit a finding of willfulness to be based on nothing more than negligence, or * * * on a completely good-faith but incorrect assumption that [the employer's conduct] complied with the [Act] in all respects." 108 S. Ct. at 1682. It would once again "virtually obliterate[] any distinction between willful and nonwillful violations." *Id.* at 1681. This Court rejected that standard in *Richland Shoe* and should do so here as well.[5]

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[5] If this were the only issue presented by this case, it would be appropriate for the Court to grant the petition, summarily vacate

C. *The court of appeals' decision that plaintiffs were entitled to double damages conflicts with this Court's decision in Richland Shoe.*

An employer who violates the Equal Pay Act must pay the plaintiff an amount representing lost wages plus "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). However, another provision of the statute gives the district court discretion not to award liquidated damages "if the employer shows to the satisfaction of the court that [his conduct] was in good faith and that he had reasonable grounds for believing that his [conduct] was not a violation of the [Act]." 29 U.S.C. § 260.

Both courts below held that the district court was required by statute to award liquidated damages in this case because GM did not act in good faith. App., *infra*, 13a-14a, 40a-41a ("[t]he court concludes that it has no choice but to award liquidated damages"). This ruling was closely intertwined with the decision on the statute of limitations issue: the determination that GM had willfully violated the Act by relying on a "discredited" legal theory "preclude[d] a finding of good faith on the part of GM." *Id.* at 14a n.14.

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the court of appeals' decision, and remand for reconsideration in light of *Richland Shoe*. The Court recently vacated and remanded for reconsideration in light of *Richland Shoe* two Seventh Circuit decisions that interpreted *Thurston* similarly to the district court in this case. *Coston* v. *Plitt Theatres, Inc.*, 831 F.2d 1321, 1327 (7th Cir. 1987) (a violation is willful if the employer "knew or reasonably should have known that its actions were in violation of the law"), vacated and remanded, 108 S. Ct. 1990 (1988); *Rengers* v. *WCLR Radio Station*, 825 F.2d 160, 166 (7th Cir. 1987), vacated and remanded, 108 S. Ct. 1990 (1988). But because the case raises other issues warranting plenary review, we believe that the Court should grant the petition to make clear that a finding of willfulness requires a showing of recklessness, not merely one of negligence, unreasonableness or good-faith error.

We doubt that a finding that an employer acted willfully should in every case preclude a finding of good faith. But even if it did, because the court of appeals' holding that GM acted willfully conflicts with this Court's decision in *Richland Shoe*, the conclusion that GM, *ipso facto*, did not act in good faith conflicts with *Richland Shoe* as well. This Court should grant the petition to conform the Eleventh Circuit's liquidated damages ruling to the legal standard announced in *Richland Shoe*.

II. The Court Of Appeals' Decision Threatens To Disrupt The Settled Practice Of Employers Throughout The Country

The impact of the Eleventh Circuit's decision goes far beyond GM and its transfer pay practice. Thousands of employers throughout the country utilize transfer pay and other wage retention practices for many legitimate reasons. By their nature, every such practice will result in some employees being paid more than others for the same work. Particularly when small employers are involved, or when courts focus on small subdivisions of large companies (such as GM's nine-employee unit involved in this case), such practices may at times result in pay disparities between men and women. But those disparities are not based on sex. They are based on sex-neutral practices that benefit employees of both sexes (by allowing them to change jobs without loss of pay) and that benefit employers (by helping them to fill job vacancies).

The Eleventh Circuit's decision subjects employers to liability under the Equal Pay Act even though they have acted in good faith and in a nondiscriminatory manner. And the potential liability is substantial: back pay, plus an equal amount of liquidated damages, plus attorneys' fees. To avoid that liability, employers will have little choice but to abandon beneficial, nondiscriminatory transfer pay practices.

The decision below leaves GM, and thousands of similarly-situated employers, with no reasonable alternative. If forced to abandon its transfer pay policy, a company could require all employees who transfer into lower-paying jobs to take a pay cut. But few employees would accept a transfer under such conditions. Or the company could prohibit employees from transferring into lower-paying jobs. But that would leave jobs unfilled, or at least prevent the best people from filling them. Or it could preserve the present practice but then readjust the salaries of all the other employees when an employee transfers into a lower-paying job. But that would be extraordinarily expensive and would make the company reluctant to transfer higher-paid employees (leaving them in dead-end jobs). None of these outcomes would advance any of the purposes of the Equal Pay Act.

GM followed its transfer pay practice in good faith in order to encourage employees to transfer from hourly wage jobs into salaried positions.[6] Other companies follow similar practices for a variety of reasons, including to accommodate employees who can no longer perform their regular jobs,[7] to ease the burden on employees during times of economic contraction,[8] to allow minority employees to move into career tracks with better promotional opportunities,[9] or to bolster morale and ease the

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[6] This serves a legitimate purpose, as evidenced by the fact that many employers have sought to move all of their employees into salaried positions. See Hulme & Bevan, *The Blue Collar Worker Goes on Salary*, 52 Harv. Bus. Rev. 104 (1975).

[7] See 29 C.F.R. § 1620.26(a).

[8] See, *e.g.*, Wallace, *Industrial Relations in a Job-Loss Environment*, 31 Lab. L. J. 473, 476 (1980).

[9] See, *e.g.*, *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 247-248 & n.99 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979) ("Red circling is a standard remedy for eliminating past discrimination which prevented employees from reaching higher jobs and is recognized as necessary since otherwise employees could not afford

burden on employees who are demoted.[10]

Experts in the field of compensation administration acknowledge that a "cluster of special situations" warrant "red-circle" and other income maintenance practices. T. Patten, *Pay: Employee Compensation and Incentive Plans* 285 (1977). See also D. Belcher & T. Atchison, *Compensation Administration* 413 (2d ed. 1987); R. Henderson, *Compensation Management: Rewarding Performance* 443 (2d ed. 1979); R. Sibson, *Compensation* 83-84 (American Management Associations 1974) (examining a variety of circumstances under which higher-than-normal "red-circle," "gold-circle," and "silver-circle" rates apply). A recent study of financial institutions in the Southwest demonstrates that "red-circle" practices are quite common; over 70% of the administrators who responded to a survey had at least some "red-circled" employees at the time. Reed & Kroll, *Red-Circle Employees: A Wage Scale Dilemma*, 66 Personnel Journal 92 (Feb. 1987).

The Eleventh Circuit's decision creates intolerable uncertainty as to the legality of this very common practice. GM has over 875,000 employees.[11] As the cases demonstrate, other large employers (including the federal government), and thousands of smaller ones, follow prac-

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to take *training* jobs paying lower wages"); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 375-376 (8th Cir. 1973) (employees who transfer "shall not be paid at a lower hourly rate than that which he received on the job from which he transferred"); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 660 (2d Cir. 1971) ("Rate retention * * * ha[s] been used to correct continuing discriminatory effects"). See also 8 Employment Coordinator (Research Inst. Am.) 81,516 (1988) ("'red circling' is a necessary element of a Title VII remedy in many cases"); E.E.O.C. *Conciliation Standards* § 632.6 (1973), *reprinted in* 2 EEOC Comp. Man. (BNA) 910:0002 (1975).

[10] See, *e.g.*, D. Belcher & T. Atchison, *Compensation Administration* 413 (2d ed. 1987).

[11] 1 *Moody's Industrial Manual* 1325 (1987).

tices similar to the one invalidated in this case.[12] These employers need uniform rules; they cannot tailor their employment practices to suit the Eleventh Circuit. Thus, the decision below will force them to abandon perfectly legitimate, sex-neutral practices, which are beneficial to employers and employees alike. That unfortunate result should not be allowed to occur without this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES A. POWELL, III
BARRY V. FREDERICK
Powell, Tally & Frederick
Suite 700
New South Federal Bldg.
21 First Avenue North
Birmingham, AL 35203
(205) 324-4996

KENNETH S. GELLER *
STEPHEN M. SHAPIRO
JAMES D. HOLZHAUER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

DAVID M. DAVIS
MARK R. FLORA
General Motors Corporation
Office of General Counsel
3031 West Grand Boulevard
Detroit, MI 48202
(313) 556-5000

* *Counsel of Record*

AUGUST 1988

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[12] See, *e.g.*, *Blocker* v. *AT & T Technology Systems*, 666 F. Supp. at 214; *Mangiapane* v. *Adams*, 20 Fair Empl. Prac. Cas. (BNA) at 700-701; *Marshall* v. *Liggett & Myers, Inc.*, 22 Empl. Prac. Dec. (CCH) at 14,184; *Adams* v. *University of Washington*, 722 P.2d at 78-82.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-7171

SHEILA ANN GLENN, PATRICIA F. JOHNS, and ROBBIE NUGENT,
Plaintiffs-Appellees,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellant,

SAGINAW STEERING GEAR DIVISION,
Defendant.

April 15, 1988

Appeal from the United States District Court
for the Northern District of Alabama

Before JOHNSON and CLARK, Circuit Judges, and DUMBAULD*, Senior District Judge.

JOHNSON, Circuit Judge:

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Sheila Ann Glenn, Patricia Johns, and Robbie Nugent filed suit against General Motors Corporation (GM) and its Saginaw Steering Gear Division, alleging violation of the Equal Pay Act.[1] The United States District Court for the Northern District of Alabama found for the appellees and awarded damages. *See Glenn v. General Motors Corp.*, 658 F.Supp. 918 (N.D.Ala. 1987). GM [2] timely appeals the district court's (1) determination that the appellees proved a prima facie case of gender discrimination, (2) rejection of GM's affirmative defense of a "factor other than sex" as the reason for the pay disparity, (3) determination that the willful character of GM's actions required application of the three-year, rather than two-year statute of limitations, (4) determination that an award of liquidated damages was appropriate, and (5) award of expenses. We affirm in part, and reverse and remand in part.

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[1] The Equal Pay Act of 1963 provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C.A. § 206(d)(1).

[2] The Equal Employment Advisory Council, substantially composed of employers subject to the Equal Pay Act, filed a brief amicus curiae in support of GM's position.

1. *Prima Facie Case*

"In order to make out a case under the Act, the [appellees] must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" *Corning Gass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974) (quoting 29 U.S.C.A. § 206(d)(1)); *accord Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1032 (11th Cir.1985).

The three appellees are employed in the Materials Management Department (previously Tool Stores Department) of the Saginaw Division of GM in three different plants near Athens, Alabama. The appellees currently work in the positions of Materials Management Expediter and Materials Follow-up Clerk, previously designated Follow-up and Associate Follow-up Tool and Die respectively. A follow-up basically ensures that adequate supplies of tools and operating materials are on hand in the GM plants to meet the minimum levels necessary to keep the plants running. Normally, each plant has three follow-ups, although GM has used less than three at times. Up to the time of suit, four women, including the appellees, (as well as men) had worked in the follow-up position. Appellee Nugent was hired in 1975, the first person to hold a follow-up position.[3]

No doubt exists that through 1985 all three appellees earned less than all their male comparators in the follow-up position in the Tool Stores Department. In fact, the most highly paid appellee made less through 1985 than the lowest paid man.[4] In addition, all the appellees re-

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[3] We take the facts set forth in this paragraph from the district court's opinion. *See* 658 F. Supp. at 920.

[4] In 1985 the monthly salaries (along with gender and starting date as a follow-up) were: Stephen Downs (man, Feb. 1977)

ceived lower starting salaries as compared to those received by men hired near the same time.[5]

GM argued at trial, and argues in its brief on appeal, that the follow-up positions held by the female appellees were not the same follow-up positions as held by their male comparators.[6] Specifically, GM argues that the male follow-ups who handle items ordered from blueprints need different skills than those follow-ups, including the appellees, who do not. The district court rejected this distinction:

$2775; Jerry Pepper (man, July 1981) $2740; Billy White (man, April 1981) $2600; Harold Wales (man, Jan. 1981) $2485; Robbie Nugent (woman, 1975) $2385; Sheila Ann Glenn (woman, Feb. 1981) $2370; and Patricia Johns (woman, Feb. 1981) $2271. *See* 658 F. Supp. at 920-22.

[5] Robbie Nugent (woman) made $600/month when she started in 1975. Richard Tanley (man) started two months later and made $660/month. Sheila Ann Glenn (woman) and Patricia Johns (woman) had monthly salaries of $1441.44 and $1316.64 respectively when they started in February 1981. Billy White (man) started two months later with a salary of $1656.46 per month. *See* 658 F. Supp. at 920-22.

[6] GM did not take this position at the start of the case. In its Dec. 20, 1983 answer, GM stated, "The defendant admits that male and female 'followups' perform the same work. . . ." On April 1, 1986, GM filed an amended answer, stating that "[t]he defendant denies that the jobs occupied by the plaintiffs are the same or substantially the same as jobs occupied by the males to whom they compare themselves."

Although GM contested this issue in its brief on appeal, GM appeared to abandon its challenge on this issue at oral argument. At oral argument, GM's counsel stated, "This case is, as I've said, brought under the Equal Pay Act by three ladies who contend that they made less money for doing the same work than men who were —who were under the same job titles. That contention is correct. We've never denied that." In addition, when GM's counsel listed the issues on appeal at oral argument, he did not include a challenge to whether the appellees had proved a prima facie case. Nonetheless, we address the merits of this contention.

> The court finds that for all purposes material to this case the positions of Blueprint Follow-Up and Follow-up are identical. The court notes that GM has never treated Follow-Ups differently for compensation purposes on the basis of items handled. When plaintiff Nugent handled blueprint items, for example, she still made less than a male Follow-Up who did not. Some of the men handling blueprint items currently make less money than other men who do not work with blueprint items.

658 F.Supp. at 923. Consequently, the district court concluded that the appellees had proved a prima facie case.

Appellate review examines whether this determination was "clearly erroneous." *Georgia Southwestern*, 765 F.2d at 1033. Under the "clear error" standard of review, evidence in the record as a whole does not indicate that the blueprint reading, even if it is an actual distinction, makes the jobs not "substantially equal." *See id.* at 1032 ("The jobs held by employees of opposite sexes need not be identical, rather, they must only be 'substantially equal.' It is important to bear in mind that the prima facie case is made out by comparing the *jobs* held by the female and male employees and showing that these jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding those jobs." (citations and footnote omitted) (emphasis in original)).

II. *GM's Affirmative Defense*

Once the appellees established a prima facie case, the burden shifted to GM to prove that the difference in pay was justified by one of the four exceptions in the Equal Pay Act: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex. 29 U.S.C.A. § 206(d)(1); *see*

Corning Glass Works, 417 U.S. at 196, 94 S.Ct. at 2229; *Georgia Southwestern*, 765 F.2d at 1036.

GM seeks to justify the pay disparity on the fourth ground—a "factor other than sex." From 1977 to its first collective bargaining agreement with the United Auto Workers (UAW) in 1982, GM, in an attempt to maintain a nonunion Alabama production force, set hourly wages at levels of parity with the national UAW contract in other locations.[7] Prior to 1977, another hourly wage schedule applied to all hourly employees, regardless of gender.

In the present case, Nugent was hired "off the street" as a salaried follow-up. Glenn and Johns transferred from their salaried secretarial positions. In contrast, the male comparators transferred from hourly wage jobs. GM contends that to encourage people to move out of hourly wage jobs into salaried tracks, it maintains a longstanding, unwritten, corporate-wide policy against requiring an employee to take a cut in pay when transferring to salaried positions such as those at issue in the present case. GM thus argues that this "policy" constitutes a "factor other than sex" and legitimizes the pay disparity.

The district court found that the "policy" suffered from a fatal flaw:

> [T]his so-called salary "policy" is in fact not a policy at all, but merely one aspect of a practice. In practice GM simply pays Follow-Ups what it takes to induce them to accept the employment. The court notes that historically companies may and do hire women at lower starting salaries. The court is thus

[7] Since 1982, the hourly wage rates are governed by the collective bargaining agreement between GM and the UAW. The collective bargaining agreement is irrelevant to the present case because all of the female appellees and the male comparators became follow-ups before 1982.

> unconvinced of GM's attempted justification for the pay disparity. The three female plaintiffs are being paid less money than their male counterparts for equal work without justification.

658 F.Supp. at 924. Consequently, the district court held that GM had failed to prove an affirmative defense justifying the pay disparity.[8]

We affirm the district court. GM seeks to defend the pay disparity as a result of the market force theory. This Court and the Supreme Court have long rejected the market force theory as a "factor other than sex": "[T]he argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the [Equal Pay] Act was designed to eliminate, and has been rejected." *Georgia Southwestern*, 765 F.2d at 1037 (citing *Corning Glass Works*, 417 U.S. at 205, 94 S.Ct. at 2233 ("The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."); *Brennan v. Victoria Bank & Trust Co.*, 493 F.2d 896, 902 (5th Cir.1974) (market force theory that a woman will work for less than a man is not a valid consideration under the Equal Pay Act); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n. 12 (5th Cir.1973)

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[8] GM argues that the district court erred by requiring that the "policy" be in writing to qualify as an affirmative defense. We do not read the district court's language, *see* 658 F. Supp. at 923-24, as relying on the absence of a writing per se. Rather, we read the district court as concluding that the absence of a writing in the context of other written policies provides independent support for its finding that the "policy" was, in fact, an illegal practice.

(same); *Hodgson v. Brookhaven General Hosp.*, 436 F.2d 719, 726 (5th Cir.1970) (same)).

GM argues that the legislative history supports its contention that prior salary can be a "factor other than sex." Under the facts of the present case, GM's argument is without merit. The relevant legislative history provides:

> Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has also been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, *reprinted in* 1963 U.S. Code Cong. & Admin. News 687, 689.

The legislative history thus indicates that the "factor other than sex" exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business. The pay disparity at issue here does not result

from any of these reasons. Consequently, resort to the legislative history does not support GM's position, but rather buttresses the district court's conclusion that a "factor other than sex" does not explain the pay disparity.

We recognize that our holding may contradict the Seventh Circuit's holding in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, —— U.S. ——, 108 S.Ct. 146, 98 L.Ed.2d 101 (1987). In *Covington*, the defendant university argued that its salary retention policy, its financial emergency, and the male comparator's education and experience justified the pay disparity. The Seventh Circuit agreed with the university, and examined whether the salary retention policy alone could be a "factor other than sex."

The university had a sex-neutral policy of maintaining an employee's salary upon a change of assignment within the university. Covington argued that

> factors other than sex for purposes of the [Equal Pay Act] . . . are limited either to business-related persons or, more narrowly, to factors that relate to the requirements of the job or to the individual's performance of that job. Covington contend[ed] that [the university]'s policy of retaining the salary of employees who change assignments does not fall within either of these categories.

816 F.2d at 321. The Seventh Circuit rejected Covington's argument. The flaws of the *Covington* decision are that the Seventh Circuit implicitly used the market force theory to justify the pay disparity and that the Seventh Circuit ignored congressional intent as to what is a "factor other than sex." Consequently, we reject *Covington* because it ignores that prior salary alone cannot justify pay disparity.[9]

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[9] Contrary to GM's gloss, *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982), does not stand for the proposition that prior salary

III. *Statute of Limitations*

The applicable statute of limitations for the present case is provided in 29 U.S.C.A. § 255(a): "[E]very [cause of] action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." The district court first determined that under the *Jiffy June* "in the picture" standard,[10] GM's actions were willful. 658 F. Supp. at 926.

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alone can justify pay disparity. In *Kouba*, the Ninth Circuit held that "the Equal Pay Act does not impose a strict prohibition against the use of prior salary." *Id.* at 878. The Ninth Circuit added that "while we share the district court's fear that an employer might manipulate its use of prior salary to underpay female employees, the [district] court must find that the business reasons given by [defendant] Allstate do not reasonably explain its use of the factor before finding a violation of the Act." *Id.* Allstate had claimed that it used prior salary to predict a new employee's performance as a sales agent. *Id.* The Ninth Circuit held that strict relevant considerations needed to be evaluated on remand to decide whether Allstate could rely on prior salary. *Kouba* is consistent with the present case because the Ninth Circuit would permit use of prior salary where the prior job resembled the sales agent position and where Allstate relied on other available predictors. In the present case, GM does not argue that the males' hourly wages serve to predict that males will be better follow-ups than the female appellees. Nor does the evidence in the record as a whole support that GM could resort to any other factor than the prior salary to justify the pay disparity.

Nor does *EEOC v. Aetna Ins. Co.*, 616 F.2d 719 (4th Cir. 1980), support GM's position. Contrary to GM's gloss, *Aetna* does not stand for the proposition that pay disparity is justified when it results from two distinct nondiscriminatory merit systems. Rather, the Fourth Circuit validated the differential because of the male comparator's experience and background. *Id.* at 726. In contrast, GM justifies the disparity on the basis of the systems alone, without record support that experience and background justify the pay disparity.

[10] This Court's predecessor examined the meaning of "willful" in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir. 1971),

GM does not contend that it met the *Jiffy June* "in the picture" standard, but rather argues that the Supreme Court disavowed that standard in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). *Thurston* addressed the definition of "willful" for liquidated damages under the Age Discrimination in Employment Act. The Supreme Court rejected the *Jiffy June* standard and held that a violation was "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 128-29, 105 S.Ct. at 625. The Court, however, expressly did not determine if the "in the picture" standard was appropriate for statute of limitations purposes. *Id.* at 127-28, 105 S.Ct. at 624-25.[11]

After the Supreme Court decided *Thurston*, however, this Court applied the *Jiffy June* standard to the precise issue presented by this appeal (i.e., the definition of "willfulness" for a statute of limitations connected with an Equal Pay Act claim). *Georgia Southwestern*, 765 F.2d at 1038-39. GM seeks to avoid *Georgia Southwest-*

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cert. denied, 409 U.S. 948, 93 S.Ct. 292, 34 L.Ed.2d 219 (1972). The Court reasoned:

> The entire legislative history of the 1966 amendments of the [Fair Labor Standards Act] indicates a liberalizing intention on the part of Congress. Requiring employers to have more than awareness of the possible applicability of the FLSA would be inconsistent with that intent. Consequently, we hold that employer's decision to change his employees' rate of pay in violation of FLSA is "wilful" [sic] when, as in this case, there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA. Stated most simply, we think the test should be: *Did the employer know the FLSA was in the picture?*

458 F.2d at 1142 (emphasis added).

[11] On October 5, 1987, the Supreme Court granted certiorari on this issue. *See Brock v. Richland Shoe Co.*, —— U.S. ——, 108 S.Ct. 63, 98 L.Ed.2d 27 (1987).

ern's binding character by pointing out, and correctly so, that this Court did not discuss *Thurston*'s impact in that case. Even if the lack of discussion concerning *Thurston* would allow us to examine the controlling character of *Georgia Southwestern*, we would adhere to the *Jiffy June* standard. The district court persuasively noted that the liquidated damages provision is punitive in nature, and that the statute of limitations has a restitutionary function. 685 F. Supp. at 926 n.1. Consequently, "willful" can have differing definitions based upon the underlying purpose of the provision.[12]

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[12] Our holding accords with the post-*Thurston* decisions of the First, Fourth, Ninth, and Tenth Circuits. *See Secretary of Labor v. Daylight Dairy Prods., Inc.*, 779 F.2d 784, 789 (1st Cir. 1985); *Donovan v. Bel-Loc-Diner, Inc.*, 780 F.2d 1113, 1117 (4th Cir. 1985); *Brock v. Shirk*, 833 F.2d 1326, 1329 (9th Cir. 1987); *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1349-50 & 1350 n.6 (10th Cir. 1986).

Our holding conflicts with the post-*Thurston* decisions of the Second, Third, Fifth, and Seventh Circuits. *See Brock v. Superior Care, Inc.*, 840 F.2d 1054, —— (2d Cir. 1988); *Brock v. Richland Shoe Co.*, 799 F.2d 80 (3d Cir. 1986), *cert. granted*, —— U.S. ——, 108 S.Ct. 63, 98 L.Ed.2d 27 (1987); *Peters v. City of Shreveport*, 818 F.2d 1148, 1167-68 (5th Cir. 1987), *petition for cert. filed* (Oct. 19, 1987); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 308-12 (7th Cir. 1986).

We recognize that the Fifth Circuit no longer adheres to *Jiffy June*, a decision binding on us in the Eleventh Circuit. In *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035, 106 S.Ct. 1245, 89 L.Ed.2d 353 (1986), the Court, in a case not involving the FLSA or a statute of limitations issue, remarked that *Thurston* overturned *Jiffy June*'s definition of willful. *Id.* at 1345. Seizing on this language, the Court held in *Peters*, a case addressing the statute of limitations under the Equal Pay Act, that *Salazar-Calderon*'s remark was controlling. 818 F.2d at 1167. *See Halferty v. Pulse Drug Co.*, 826 F.2d 2 (5th Cir. 1987) (*Peters* requires that panel vacate its earlier holding that *Jiffy June* required a three-year statute of limitations). We choose not to follow the Fifth Circuit's disapproval of *Jiffy June*, especially because the Fifth Circuit did not examine the restitutionary policy underlying the statute of limitations.

The district court alternatively held that GM failed *Thurston*'s reckless disregard standard. 658 F. Supp. at 927. We affirm the district court on this alternative ground as well. GM showed reckless disregard because, as noted above, GM sought to rely on the market force theory, a theory long discredited by this Court and the Supreme Court.[13]

IV. *Liquidated Damages*

Under 29 U.S.C.A. § 216(b), affected employees shall recover liquidated damages from their employer for violations of the Equal Pay Act. An employer may avoid the mandatory nature of an award of liquidated damages if the court chooses not to make an award where the employer shows its actions were in good faith and shows it had reasonable grounds for believing that those actions did not violate the Equal Pay Act. *See* 29 U.S.C.A. § 260.

The district court initially held that GM's violation of the Equal Pay Act was in good faith and predicated upon reasonable grounds. It therefore did not award liquidated damages. 658 F. Supp. at 925. The district court later awarded liquidated damages, determining that, although individual GM officials held a good faith belief that GM had adopted a transfer pay policy, GM lacked reasonable grounds to support a belief that its acts were in conformity with the law. *Id.* at 928.

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[13] Because of our holding we express no view on the merits of the district court's observation that

> [a]s an explanation for its conduct during settlement negotiations, General Motors has brought to this court's attention its policy of obtaining the resignation of employees who file discrimination claims as a condition precedent to settlement. This court feels obliged to point out that a policy of retaliatory discharge may be *per se* "willful" under *Thurston*.

658 F. Supp. at 927 n.5; *see Powell v. Rockwell International Corp.*, 788 F.2d 279, 286 & n.6 (5th Cir. 1986).

We affirm the district court. As noted above, this Circuit and the Supreme Court have long discredited the market force theory. Consequently, GM could not have had reasonable grounds to support a belief that its acts were in conformity with the law.[14]

V. *Expenses*

In addition to awarding damages to the appellees and awarding attorney fees to the appellees' counsel, the district court also awarded the appellees' counsel $34,979.44 in expenses, which the district court found "to have been reasonably expended under the circumstances for paralegals, law clerks, fee counsel, general office litigation expenses and expert witnesses." 658 F. Supp. at 932. GM challenges the district court's award of expenses, particularly $12,614 as fees for two expert witnesses.[15] As support for its position, GM relies on *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, —— U.S. ——, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987), a case decided after the district court awarded expenses in the present case.

We begin our analysis with the language of 29 U.S.C.A. § 216(b), which provides in relevant part that "[t]he court in [an Equal Pay Act] action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." We note from the outset that this Court has never determined whether Sec-

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[14] We note that our conclusion in the context of the discussion on the statute of limitations issue that GM's actions met *Thurston*'s definition of "willful" precludes a finding of good faith on the part of GM. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1561 (11th Cir. 1988) ("[U]nder the *Thurston* definition to find 'good faith' after a finding of 'willful' violation is illogical; the two terms are now mutually exclusive.").

[15] The district court awarded $8,120 for Dr. Paul Lees-Haley, who was deposed, but did not testify, and awarded $4,494 for Dr. William Farrar, who was deposed and did testify.

tion 216(b) permits an award of expenses for expert witness fees.[16]

An analogy, however, is possible. This Court permits an award of expert witness fees in civil rights cases. *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. Jan. 1981) (en banc), *cert. dismissed*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981).[17] The en banc Court looked to congressional intent and determined that recovery for expert witness fees allowed citizens to recover what it costs them to vindicate civil rights in court. *Id.*[18] Similar policies underlie Section 216(b), thereby suggesting that the district court properly awarded expert witness fees to the appellees.

Our analysis, however, would not be complete without an examination of the *Crawford Fitting* decision. In that case, the Supreme Court held "that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821

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[16] In *King v. McCord*, 621 F.2d 205 (5th Cir. 1980), the prevailing plaintiff sought attorney fees of $30,000 and costs for expert witnesses of $5,888.45. The district court awarded a lump-sum figure of $2,000 for attorney fees and costs. This Court's predecessor expressly noted that the "[a]ppellant filed this appeal on the basis of the alleged inadequate fee award only." *Id.* at 206. Consequently, the expert witness costs question was not addressed.

[17] The Fifth Circuit has overruled this aspect of the *Jones v. Diamond* opinion. *International Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174, 1175, 1180 (5th Cir. 1986) (en banc).

[18] The Court recognized that its holding contradicted the general rule that 28 U.S.C. § 1821 limits the expert witness fees award (currently a limit of $30 per day). This Circuit adheres to that general rule. *See Kivi v. Nationwide Mutual Ins. Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983) ("[I]t is well settled that expert witness fees cannot be assessed in excess of witness fees provided in § 1821."); *see also Osterneck v. E.T. Barwick Industries*, 825 F.2d 1521, 1530 n.15 (11th Cir. 1987) (dicta).

and § 1920." *Id.* 107 S.Ct. at 2499.[19] Significantly, the Court broadly observed that

> [a]lthough Congress responded to our decision in *Alyeska* [*Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)] by broadening the availability of attorney's fees in the federal courts, see . . . 42 U.S.C. § 1988, it has not otherwise "retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors." Thus, we are once again asked to hold that a specific congressional enactment on the shifting of litigation costs is of no moment. We think that, as in *Alyeska*, Congress has made its intent plain in its detailed treatment of witness fees. We will not lightly infer that Congress has repealed §§ 1920 and 1821, either through Rule 54(d) or *any other provision not referring explicitly to witness fees.*

Id. (citations omitted) (emphasis added).

The Supreme Court's broad statement suggests that the district court erred in awarding expert witness fees because Section 216(b) does not refer explicitly to them. *Cf.* The Equal Access to Justice Act, 28 U.S.C.A. § 2412 (d)(1)(A) ("[A] court shall award to a prevailing party other than the United States fees *and other expenses*, in addition to any costs awarded [as enumerated in 28 U.S.C.A. § 1920]. . . ." (emphasis added)); *see also International Woodworkers of America v. Champion International Corp.*, 790 F.2d 1174, 1179 & n.7 (5th Cir. 1986) (en banc) (collecting the "numerous statutes expressly allow[ing] federal courts to award the full amount of expert witness' fees as costs of litigation.").

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[19] Section 1920(3) provides that witness fees may be taxed as costs. Section 1821(b) provides that a "witness shall be paid an attendance fee of $30 per day for each day's attendance."

One basis for distinguishing *Crawford Fitting* from the present case has been suggested.[20] Because *Crawford Fitting* involved only the award of costs pursuant to Federal Rule of Civil Procedure 54(d),[21] that case did not necessarily determine whether expert witness fees could be awarded pursuant to a fee-shifting statute.[22] We hold that the broad language in *Crawford Fitting* does not permit a distinction based upon whether or not the award is made under a fee-shifting statute.[23] The

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[20] Three Supreme Court Justices noted that *Crawford Fitting* did not address whether a district court may award expert witness fees under Section 1988, an explicit fee-shifting statute. 107 S.Ct. at 2499 (Blackmun, J., concurring); *id.* at 2500 n.1 (Marshall, J., dissenting) (joined by Brennan, J.).

[21] Rule 54(d) provides in relevant part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ."

[22] The District Court of Massachusetts has seized on this distinction to award expert witness fees pursuant to Section 216(b). *Freeman v. Package Machinery Co.*, 1987 Westlaw 16456, at 13 (D. Mass. Sept. 2, 1987) ("Defendant's reliance on *Crawford* is misplaced because that opinion was inapplicable to cases involving explicit fee shifting statutes. . . ."). *But see Eivins v. Adventist Health System/Eastern & Middle America, Inc.*, 660 F. Supp. 1255, 1264 (D. Kan. 1987) (expert witness fees under § 216(b) limited to $30 per day); *cf. Furr v. AT & T Technologies, Inc.*, 824 F.2d 1537, 1550 (10th Cir. 1987) (Section 216(b) may permit expert witness fees as part of attorney fees, but parties stipulated to amount of attorney fees and court would not address issue; court implicitly held that expert witness fees could not be part of costs awarded).

[23] Post-*Crawford Fitting* cases examining the issue pursuant to Section 1988 or other civil rights fee-shifting provisions have not permitted awards for expert witness fees. *See Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3d Cir. 1987) ("A prevailing party in a civil rights case is not entitled to tax [expert witness] fees as costs." (citing *Crawford Fitting*)); *Leroy v. City of Houston*, 831 F.2d 576, 584 (5th Cir. 1987) ("Although [*Crawford Fitting*] expressly considered whether [Rule] 54(d) could, in an antitrust case, override the statutory limit on witness fees, the Court's general

broad language in *Crawford Fitting* indicates that, although a statute may shift *attorney* fees, the statute does not operate to shift *witness* fees unless the statute refers explicitly to witness fees. In the present case, Section 216(b) does not refer explicitly to witness fees. In addition, nothing in the legislative history associated with Section 216(b)'s passage suggests that Congress intended the term "costs of the action" to differ from those costs as now enumerated in 28 U.S.C.A. § 1920. Consequently, we hold that the district court erred in awarding expert

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reasoning leaves us no room to construe the Voting Rights Act provision here otherwise. The Voting Rights Act does not specifically allow recovery of expert witness fees, and we must reverse this portion of the district court's award." (citation omitted)); *ECOS, Inc. v. Brinegar*, 671 F. Supp. 381, 404 n.12 (M.D.N.C. 1987) (*Crawford Fitting* persuasive authority for holding that $30 per day limit governs § 1988 award for expert witness fees); *Alberti v. Sheriff of Harris County*, —— F. Supp. ——, —— (S.D. Tex. Aug. 20, 1987) (same). *See also Catlett v. Missouri Highway & Transportation Commission*, 828 F.2d 1260, 1272 (8th Cir. 1987) (in light of *Crawford Fitting*, defendant in Section 1983 Title VII case "will be free [on remand] to challenge the assessment against it of the class" expert witness fees). *Cf. Mennor v. Fort Hood National Bank*, 829 F.2d 553, 557 (5th Cir. 1987) (in Title VII case, district court could award attorney's out-of-pocket costs because 28 U.S.C.A. § 1920 does not regulate those costs). *But see United States v. Yonkers Board of Education*, 118 F.R.D. 326, 330 (S.D.N.Y. 1987) (*Crawford Fitting* does not preclude award of expert witness fees). *But cf. Jones v. City of Chicago*, 1987 Westlaw 19800, at 8-9 (N.D. Ill. Nov. 10, 1987) ("[A]lthough the costs defendants object to are in large part no longer allowable under Section 1920, they are allowable as part of the reasonable attorney's fees obtainable by the plaintiff under Section 1988 [for out-of-pocket expenses incurred by the attorney in preparation of trial].").

We recognize that, in contrast to the language of Section 1988 and 42 U.S.C. § 2000e-5(k) (Title VII's fee-shifting provision), the language of Section 216(b) is mandatory, favors plaintiffs only, and separates attorney fees from costs. In light of *Crawford Fitting*'s broad language and the absence in Section 216(b)'s legislative history of congressional intent to compensate plaintiffs fully for expert witness fees as part of the costs of the action, we attach no significance to the difference in statutory language.

witness fees in excess of the amount permitted by 28 U.S.C.A. § 1821 and 28 U.S.C.A. § 1920. We thus remand this case to the district court so it may tailor the award of expert witness fees in accordance with this opinion. On remand, the district court also must ensure that only those items permitted to be taxed as costs are included in the award of expenses and that the amount of the award attributable to each of those items falls within the statutory limit as to that amount.

VI. *Conclusion*

In conclusion, we AFFIRM that the appellees established a prima facie case under the Equal Pay Act. We AFFIRM that GM failed to prove the pay disparity resulted from a "factor other than sex." We AFFIRM that the three-year statute of limitations applied. We AFFIRM that liquidated damages were appropriate. We REVERSE and REMAND as to expenses awarded.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Civil Action No. CV-83-V-5777-NE

SHEILA ANN GLENN, *et al.*,
Plaintiffs,

versus

GENERAL MOTORS CORPORATION,
Defendant.

[Filed July 10, 1986]

OPINION AND ORDER

The factual and legal statements incorporated in this opinion constitute the court's findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a). In this case plaintiffs, Sheila Ann Glenn ("Glenn"), Patricia J. Johns ("Johns"), and Robbie Nugent ("Nugent"), claim that the defendant, General Motors Corporation ("GM"), violated the Equal Pay Act, 29 U.S.C. § 206(d).[1]

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[1] 29 U.S.C. § 206(d)(1) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made

The three plaintiffs are employed in the Materials Management Department (previously Tool Stores Department) of the Saginaw Division of GM in three different plants near Athens, Alabama. The plaintiffs currently work in the positions of Materials Management Expediter and Materials Follow-Up Clerk, previously designated Follow-Up and Associate Follow-Up Tool and Die respectively. A Follow-Up basically insures that adequate supplies of tools and operating materials are on hand in the GM plants to meet the minimum levels necessary to keep the plants running. A portion of the information used in the job is computer-generated. Normally, each plant has three Follow-Ups, but at times GM has used less than three. Up to the time of this suit, four women, including plaintiffs, have worked in the Follow-Up position—all other Follow-Ups have been men.

The Plaintiffs

Plaintiff Nugent was hired by GM *"off the street"* (from outside GM) in 1975 as a level 4 Associate Follow-Up Tool and Die, with salary of $600.00 per month. She was employed in Plant 21. Nugent was the first person hired by GM in a Follow-Up capacity. Nugent was told by GM that she was starting at the bottom of the salary scale but that in six months she would be evaluated on her ability. Nugent became a level 5 Follow-Up with no change in job duties during the second quarter of 1978 at a base monthly salary of $1,100.00. During 1984, her job title was changed to Materials Management Expediter. In 1985, her base monthly salary was $2,385.00. At

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pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

time of trial, her base monthly salary was $2,505.00, effective January 1986.

Plaintiff Glenn was hired "off the street" by GM in September 1977 as a salaried employee in Plant 21. Glenn was hired into a level 3 stenographer position with a base salary of $755.00 per month. In February 1981 Glenn transferred from the position of stenographer, at a base salary of $1,310.40, to the position of level 4 Associate Follow-Up Tool and Die in Plant 23. Glenn's base salary, after transfer, was $1,441.44 per month. In 1984, Glenn's job title was changed to Materials Follow-Up Clerk. In 1985 her base salary was $2,370.00 per month. At time of trial, her base monthly salary was $2,550.00, effective January 1986.

Plaintiff Johns was hired "off the street" by GM in October 1978 as a salaried employee in the position of secretary to the Plant 22 superintendent. In February 1981 Johns became a level 4 Associate Follow-Up Tool and Die in Plant 22 with a base monthly salary of $1,316.64. Johns currently holds the title of Materials Follow-Up Clerk, and her 1985 base salary was $2,271.00 per month. Her monthly salary at time of trial was $2,405.00, effective January 1986.

The Plaintiffs' Male Counterparts

In September 1975, Richard Tanley transferred from the hourly tool crib job at GM to the position of Associate Follow-Up Tool and Die alongside plaintiff Nugent in Plant 21, at a monthly base salary of $660.00. In April 1978 Tanley was given the level 6 position of supervisor, Tool Stores Department, Plant 22. In 1985 he was the Receiving and Inspection Supervisor. Tanley's job duties did not change when he was promoted from Associate Follow-Up to Follow-Up.

Stephen Downs was hired as an hourly employee at the Saginaw plant in January 1976. His job position was

skilled trades—70 Rate, however, he held the position of forklift driver. His base monthly equivalent salary was $932.35. Downs transferred from hourly to salaried employment, taking the position of Associate Follow-Up Tool and Die in February 1977. He worked in Plant 21 alongside Robbie Nugent. His monthly base salary was $975.00, which increased to $1,075.00 in April 1977. Nugent's monthly base salary for the same period was $878.94. In April 1978 Downs became a Follow-Up, with a base monthly salary of $1,250.00. His job duties did not change. Plaintiff Nugent's base monthly salary at that time was $1,100.00. In 1985 Downs' job title was changed to Materials Management Expediter. In May 1985 he took the position of Senior Materials Management Expediter, a level 6 position. His job duties did not change. In 1985 his monthly base salary was $2,775.00; Plaintiff Nugent's was $2,385.00.

Steven D. Greenlee was hired in April 1979 as an Associate Follow-Up Tool and Die for Plant 22. His monthly base salary was $1,175.00. Greenlee remained an Associate Follow-Up until he was laid off during June 1980. At the time of his layoff, his base monthly salary was $1,545.40. Greenlee was recalled during January 1981 to the same position he had previously held, at a base monthly salary of $1,545.54. During June 1981 Greenlee assumed a level 5 position of supervisor-in-training, and in September 1981 he became a production supervisor. In June 1985 Greenlee held the position of production supervisor.

Harold Wales was hired by GM during June 1977 at an hourly rate as a job setter—30 Rate. He received a monthly equivalent wage of $1,216.57. In May 1978 he transferred to the salaried position of Follow-Up Tool and Die alongside plaintiff Nugent in Plant 21 at a monthly base salary of $1,230.00. One month later he returned to an hourly position. In January 1981 Wales left his position of machine operator—20 Rate, with a

monthly equivalent wage of $1,608.22, and resumed the position of Follow-Up Tool and Die in Plant 21, with a monthly base salary of $1,608.22. Harold Wales currently holds the position of Materials Management Expediter. His job duties have not changed. In 1985 his base monthly salary was $2,485.00.

Robert Stephenson was hired by GM in March 1978 as an hourly employee, machine operator—20 Rate; however, in fact he was a crib attendant. His monthly equivalent pay was $1,171.51. Stephenson testified he applied for a salaried Tool Stores position but was hired as an hourly tool crib attendant. During September 1978 he transferred to the salaried position of Associate Follow-Up Tool and Die in Plant 22 at a monthly base salary of $1,220.00. Stephenson held this position until June 1980, at which time he returned to an hourly position as a tool crib attendant, and was paid $1,293.44 per month. He remained an hourly employee until January 1981, at which time he transferred to the position of Associate Follow-Up in Plant 22, with a base monthly salary of $1,564.00. Sometime between September 1982 and September 1983, Stephenson took the level 5 position of Follow-Up. In September 1984 his job title changed to Materials Management Expediter, fifth level. His base monthly salary increased from $1,752.96 to $1,875.66, but his job duties remained the same. GM admitted that Bobby Stephenson was transfered to the position of Associate Tool and Die Follow-Up in 1978 at GM's Plant 22 at a higher base salary than Robbie Nugent was being paid in Plant 21 at the time of Stephenson's transfer.

Billy White was hired by GM in December 1978 as an hourly employee. He held the position of machine operator—20 Rate, with a monthly equivalent pay of $1,608.22. In April 1981 he took the position of Associate Follow-Up Tool and Die in Plant 23, with a monthly base salary of $1,656.46. In 1984 his job title was changed from Associate Follow-Up to Materials Follow-Up Clerk, and dur-

ing May 1985, he was given a level 5 position as a Materials Management Expediter. White's job duties remained the same. His base salary in 1985 was $2,600.00. White was hired nearest in time to plaintiffs Glenn and Johns.

Jerry Pepper became an Associate Follow-Up in July 1981 at a monthly salary of $1,656.00. Jerry Pepper's job title was changed to Materials Follow-Up Clerk in 1984. In June 1985 Pepper became a level 5 Materials Management Expediter. Despite the change in job, Pepper's duties have remained the same. His 1985 base monthly salary was $2,740.00.

The Pay Disparity

Through 1985 all three plaintiffs earned less than all of their male counterparts in the Follow-Up position in the Tool Stores Department. In fact, the most highly-paid plaintiff made less through 1985 than the lowest-paid man. Plaintiff Nugent was hired as an Associate Follow-Up two months before Richard Tanley was hired in the same capacity, yet Tanley's monthly salary was $60 higher. Plaintiffs Johns and Glenn were hired as Associate Follow-Ups two months before Billy White, yet White's starting Associate Follow-Up salary was $215 per month higher than Glenn's and $336 per month higher than Johns'.

Plaintiffs Glenn, Johns and Nugent each received an "inequity adjustment" shortly after plaintiffs Johns and Glenn filed their EEOC charges. No one else in the Tool Stores Department received an "inequity adjustment." In determining whether to give an "inequity adjustment" to salary, the GM salaried personnel administration looks at the employee's salary in relation to a new hire's salary, the employee's performance and length of service. In August 1983 plaintiff Glenn received an "inequity adjustment" of $150.56. Defendant's stated reason for the adjustment was "due to review of salary structures of Tool Stores Department." In August 1983 plaintiff Johns

received an "inequity increase" in the amount of $142.82. The defendant's stated reason for the adjustment was "due to review of salary structure of Tool Stores Department." Plaintiff Nugent was the only employee in her department to get an inequity adjustment. The "inequity adjustment," made in August 1983, was in the amount of $159.74.

GM quibbles about whether the Follow-Up job handled by the three women plaintiffs and the men are comparable, and attempts to distinguish them on the basis of specific items handled by Follow-Ups. The function of the Tool Stores Department is generally to provide for all non-productive material that is used within the plants.[2] It involves the management of inventories and maintenance of the plants to keep the plants running. It also includes management of janitorial supplies. Specific functions include ordering non-productive material for the three Alabama plants, specifying order quantities, maintaining tooling crib stock levels, and making special or "emergency" buys. The positions held by plaintiffs and their male counterparts in October 1983 were "Follow-Up Tool and Die" and "Associate Follow-Up Tool and Die." These titles were changed in September 1984 to "Materials Management Expediter," "Materials Follow-Up Clerk," and "Senior Materials Management Expediter," although the job requirements and functions remained the same under all five of these titles. Except for six months in 1983 when all Tool Stores Departments for

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[2] "Non-productive" materials are materials required to operate the plant and maintain machinery to build the parts for a GM automobile. Such materials include, but are not limited to: bearings; chains; seals; power transmission parts (such as sprockets, couplings, reducers and gear boxes); electrical parts; blueprint tooling; stationery items (such as paper, forms, tags, pencils); spare parts; cutting tools; hand tools; tool holders; abrasives; grinding wheels; maintenance and tool steel oils; chemicals; lubricants; nuts, bolts, and screws; charts; springs; janitorial supplies and other miscellaneous supplies.

the three plants were consolidated, each plant has had a separate Tool Stores Department. A Follow-Up and Associate Follow-Up in Tool Stores orders and disburses non-productive materials, confirms orders, processes emergency orders, and processes daily paper work. They set up new items of inventory, and they deal with outside salesmen.

GM contends that the male Follow-Ups who handle items ordered from blueprints need different skills than those Follow-Ups, including the plaintiffs, who do not. The court finds that for all purposes material to this case the positions of Blueprint Follow-Up and Follow-Up are identical. The court notes that GM has never treated Follows-Ups differently for compensation purposes on the basis of items handled. When plaintiff Nugent handled blueprint items, for example, she still made less than a male Follow-Up who did not. Some of the men handling blueprint items currently make less money than other men who do not work with blueprint items. The only current Follow-Up who has had college training in working with blueprints is plaintiff Johns, and she does not handle blueprint items at present.

The court does not doubt that increased familiarity with blueprint items may enable the Follow-Ups who handle them to work with them in a more meaningful way, but GM does not require formal blueprint training. The court does not credit any evidence presented by GM indicating that Blueprint Follow-Ups actually interpret blueprints. GM has skilled "troubleshooters" and engineers present to carry on this function, and the court finds it highly unlikely that GM would rely on unskilled Follow-Ups to interpret blueprints to its suppliers when the continued viability of the plants is at stake. The Blueprint Follow-Ups provide the vendors with only routine information that can be obtained from the blueprints without actually interpreting them.

GM attempts to justify the pay disparity between the male and female Follow-Ups by emphasizing the route by which each Follow-Up progressed by the Follow-Up position. GM contends that the male Follow-Ups transferred into their positions from higher-paid hourly jobs within GM, and that GM maintained this higher level of pay to encourage them to make the move to a salaried Follow-Up position. The higher hourly salaries were the result of collective bargaining which did not affect the salaried positions. The women plaintiffs, GM argues, came from lower-paid *salaried* positions within GM. GM asserts that their salary policies are gender-neutral, and are uniformly applied in determining entry salaries for Follow-Ups.

GM's asserted policy to encourage employees to transfer from hourly positions to salaried positions by maintaining the same rate of pay after transfer is not in writing. GM maintains a written salaried administration plan or manual, commonly referred to as the "black book," which contains no mention of the "transfer policy." GM also maintains a written merit plan, to determine certain pay increases, which contains no reference to the "transfer policy."

The court finds that this so-called salary "policy" is in fact not a policy at all, but merely one aspect of a practice. In practice GM simply pays Follow-Ups what it takes to induce them to accept the employment. The court notes that historically companies may and do hire women at lower starting salaries. The court is thus unconvinced of GM's attempted justification for the pay disparity. The three female plaintiffs are being paid less money than their male counterparts for equal work without justification.

In order for plaintiffs to establish a prima facie case under the Equal Pay Act, they must show "that an employer pays different wages to employees of opposite sexes

'for equal work on jobs the performance of which requires equal skills, effort, and responsibility, and which are performed under similar working conditions.'" *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974); *Morgado v. Birmingham-Jefferson County Civil Defense Corps*, 706 F.2d 1184, 1187-88 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 715 (1984). The Equal Pay Act "also establishes four exceptions—three specific and one a general catchall provision—where different payment to employees of opposite sexes 'is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.'" *Corning*, 417 U.S. at 196. The court is convinced that plaintiffs have carried their burden of establishing a prima facie case of liability under the Equal Pay Act, and that the defendant GM has failed to establish any of the Act's four exceptions justifying a pay disparity.[3]

On the issue of damages, the court must determine the applicable statute of limitations for this Equal Pay Act action. 29 U.S.C. § 255(a) provides that such actions "may be commenced within *two years* after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a *willful violation* may be commenced within *three years* after the cause of action accrued." The court in *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985), provided these guidelines for determining when a "willful" violation has occurred ne-

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[3] Plaintiffs also alleged a claim of retaliation against GM. Plaintiffs contended at trial that various actions taken by GM constituted improper acts in retaliation for plaintiffs having brought this suit. The court finds a paucity of evidence to support a claim of retaliation and therefore denies the claim.

cessitating the application of the three-year statute of limitations:

> [A] violation is willful if the employer knows or has reason to know that his or her conduct is governed by the [Equal Pay] Act. *Brennan v. Heard*, 491 F.2d 1 (5th Cir. 1974). An employer need not proceed with knowledge that his or her actions are contrary to the Act in order for willfulness to be found. *Id.* An action is "willful" if the employer knew that the Act was "in the picture" regardless of the defendant's good faith. *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948, 93 S. Ct. 292, 34 L. Ed.2d 219 (1972). *See also Marshall v. A & M Consolidated Independent School District*, 605 F.2d 186, 190-91 (5th Cir. 1979) (actual awareness of the law is unnecessary to establish willfulness; knowledge is imputed).

Brock, 765 F.2d at 1039.[4] Clearly, in this case GM knew

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[4] The court notes that the Supreme Court's decision in *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613 (1985), is inapposite. In *TWA* the Court defined a violation of the Age Discrimination in Employment Act as "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *TWA*, 105 S. Ct. at 625. *TWA*, however, concerned the award of *liquidated damages*, not the determination of the applicable statute of limitations. The Court noted: "Even if the 'in the picture' standard were appropriate for the statute of limitations, the same standard should not govern a provision dealing with liquidated damages." *Id.* The Court emphasized the distinction between defining the term "willful" in the context of the liquidated damages provision of the ADEA, and defining "willful" in terms of 29 U.S.C. § 255(a) concerning the applicable statute of limitations in Equal Pay Act cases. This circuit in a post-*TWA* decision has clearly adhered to the "in the picture" definition of "willful" in the Equal Pay Act statute of limitations context, and the court's application of this standard is therefore not affected by the *TWA* decision. *See Brock*, 765 F.2d at 1039.

more than that the Equal Pay Act was merely "in the picture." GM was aware at all times material to this litigation that the Equal Pay Act governed their conduct concerning plaintiffs. In fact GM has admitted that it knew about the Equal Pay Act three years prior to the date of the filing of plaintiffs' lawsuit (October 1983). The court will therefore apply a three-year statute of limitations in determining the damage award for plaintiffs.

Plaintiffs further contend that they are entitled to liquidated damages pursuant to 29 U.S.C. § 216(b) which provides as follows:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.

29 U.S.C. § 216. Section 260, however, provides that "if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages . . . ." 29 U.S.C. § 260. For this court to exercise its discretion, GM "must show that [its] failure was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose liquidated damages upon [it]." *Hays v. Republic Steel Corp.*, 531 F.2d 1307, 1309 n.3 (5th Cir. 1976). This court is convinced that GM's violation of the Equal Pay Act, while "willful" as that term is defined by this circuit in this context, was in good faith and predicated upon reasonable grounds. As stated in *Brock*, an act may be " 'willful' if the employer knew that the [Equal Pay] Act was 'in the picture' regardless of the defendant's good faith."

Brock, 765 F.2d at 1039. GM knew that their conduct was governed by the Equal Pay Act, but created the pay disparity concerning plaintiffs in good faith believing the disparity justified on the basis of their hourly transfer pay "policy." The court, therefore, will not award liquidated damages.

Because the parties have not fully presented their respective contentions concerning the computation of damages, the court directs the plaintiffs to submit a memorandum within twenty days from this date addressing in itemized detail the precise method of computation of plaintiffs' damages and presenting their authority for the award of prejudgment interest. Defendant shall thereafter have fifteen days for the filing of a countermemorandum. The parties should be mindful of the court's ruling that liquidated damages will not be awarded and that the three-year statute of limitations applies. The issue of the award of attorney's fees previously was reserved in this case for future consideration, and the court further directs that within twenty days following the date of this opinion plaintiffs shall submit their application for attorney's fees with supporting memorandum. If defendant desires to respond to plaintiffs' attorney's fees memorandum it may do so within fifteen days following the filing of plaintiffs' application and memorandum. The court admonishes both parties that they should attempt to reach an agreement on both damages and attorney's fees and should promptly communicate such agreement to the court. If no agreement is reached by the expiration of the time allowed above for the filing of defendant's fees response, the court will set a hearing to consider the computation of damages and attorney's fees.

DONE and ORDERED this 10th day of July, 1986.

/s/ Robert S. Vance
United States Circuit Judge
Sitting by Designation

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Civil Action No. CV83-V-577NE

SHEILA ANN GLENN, PATRICIA F. JOHNS
and ROBBIE NUGENT,
Plaintiffs,

versus

GENERAL MOTORS CORPORATION,
Defendant.

JUDGMENT

In consideration of the findings of fact and conclusions of law contained in this court's Opinion and Order entered July 10, 1986 and in the Memorandum of Decision filed contemporaneously herewith, it is by the court

ORDERED, ADJUDGED and DECREED that plaintiffs have and recover of defendant the amounts indicated by their respective names as follows:

Sheila Ann Glenn: Twenty-four thousand nine hundred ninety-eight and 91/100 dollars ($24,998.91).

Patricia F. Johns: Thirty-four thousand five hundred thirty-four and 33/100 dollars ($34,534.33).

Robbie Nugent: Forty-three thousand seven hundred ninety-four and 57/100 dollars ($43,794.57).

It is further ORDERED, ADJUDGED and DECREED that Bell, Richardson, Herrington, Sparkman and Shepard, P.A. be and is hereby awarded one hundred thirty-

two thousand dollars ($132,000.00) in fees and thirty-four thousand nine hundred seventy-nine and 44/100 dollars ($34,979.44) in expenses for their services in representing the plaintiffs and accordingly that said attorneys have and recover of defendant one hundred sixty-six thousand nine hundred seventy nine and 44/100 dollars ($166,979.44); and that costs of court are taxed against defendant.

DONE and ORDERED this 4th day of February, 1987.

/s/ Robert S. Vance
United States Circuit Judge
Sitting by Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Civil Action No. CV83-V-577NE

SHEILA ANN GLENN, PATRICIA F. JOHNS
and ROBBIE NUGENT,
Plaintiffs,

vs.

GENERAL MOTORS CORPORATION,
Defendant.

MEMORANDUM OF DECISION

After entering the Opinion and Order dated July 10, 1986, the court received a verified motion for attorney's fees, as well as memoranda from the respective parties concerning the computation of damages and the award of attorneys' fees. On December 2, 1986, the court held an evidentiary hearing and received further oral argument. As that time, the parties submitted exhibits, affidavits, and oral testimony. Thereafter, post hearing memoranda were submitted. The court has now fully considered these matters and enters the following Memorandum of Decision, which incorporates the findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a). Except as modified herein, the Opinion and Order of July 10 remains in full effect.

I. DAMAGES ISSUES

1. *Statute of Limitations*—The first issue confronting the court is the construction of the word "willful" in the statute of limitations section of the Portal-to-Portal Act,

29 U.S.C. section 255 (a). A "willful" violation of the Equal Pay Act, 29 U.S.C. § 206 (d), adds one year to the statute of limitations, significantly increasing General Motors' liability. In *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985), the Eleventh Circuit reaffirmed its commitment to the "in the picture" standard, which was pioneered in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972). Under this standard, a violation is "willful" if the employer knows or has reason to know that the Equal Pay Act governs its conduct. When the employer knows that the Equal Pay Act is "in the picture," its violation is "willful" regardless of the employer's good faith. *Brock v. Georgia Southwestern College*, 765 F.2d at 1039. General Motors has admitted that it knew that the Equal Pay Act governed its conduct. For three years prior to the time the plaintiffs filed this lawsuit, the plaintiffs continually protested General Motors' violation of their rights.

General Motors argues that the "in the picture" standard is no longer viable. Specifically, General Motors points to *Transworld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), in which the Supreme Court elaborated a different construction of the word "willfulness."[1] Both the

[1] In fact, *Thurston*, addresses the construction of the word "willfulness" in a completely different context—an age discrimination action—where section 7(b) of the ADEA permits liquidated damages "only in cases of willful violations." 29 U.S.C. § 626(b). Although *Thurston*, rejected the *Jiffy June* "in the picture" analysis for liquidated damages under the ADEA, the Supreme Court expressly noted that the *Jiffy June* standard might be appropriate for statute of limitations questions. 105 S.Ct. at 625; *see also E.E.O.C. v. McCarthy*, 768 F.2d 1, 5 (1st Cir. 1985). Differentiating between these two settings is consistent with the different purposes served by the ADEA's liquidated damages provision and a statute of limitations. Congress intended the liquidated damages provision of the ADEA to serve the same punitive purpose as § 16(a) of the FLSA, which imposes a criminal penalty for "willful" violations. It is not surprising that the Supreme Court relied upon cases inter-

Third and Seventh Circuits have held that "willful" means the same thing throughout the Age Discrimination in Employment Act (ADEA) and Fair Labor Standards Act (FLSA). *See, e.g., Brock v. Richland Shoe Co.*, 799 F.2d 80, 82-83 (3rd Cir. 1986); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 308-312 (7th Cir. 1986).[2] Under this view, *Thurston* supplies a uniform definition of "willful" for both statutes: "a violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 105 S. Ct. at 625.

The *Thurston* reckless disregard standard requires an employer to make a "reasonable effort to determine whether the plan he is following would constitute a violation of the law." 105 S. Ct. at 624 (quoting *Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir. 1950), *cert. denied*, 342 U.S. 876 (1951)).[3] In *Thurston*, TWA

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preting the FLSA criminal penalty provision in order to fashion a similar standard for applying section 7(b), its ADEA counterpart. *See Thurston*, 105 S.Ct. at 624. In contrast, a statute of limitations is not punitive but restitutionary: it extends the period for the recovery of back wages wrongfully withheld. *See Secretary of Labor v. Daylight Dairy Products, Inc.*, 779 F.2d 784, 789 (1st Cir. 1985); *Donovan v. Bel-loc Diner, Inc.*, 780 F.2d 1113, 1117 (4th Cir. 1985). This court does not believe that the Supreme Court's interpretation of one statute can be authority for the interpretation of another so strikingly different in purpose. In the absence of such authority, this court is bound by Eleventh Circuit precedent.

[2] Apparently a majority of other jurisdictions continue to apply the "in the picture" standard. *See, e.g., Nolting v. Yellow Freight System, Inc.*, 799 F.2d 1192 (8th Cir. 1986); *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d 1345, 1349-50 (10th Cir. 1986); *Secretary of Labor v. Daylight Products, Inc.*, 779 F.2d 784 (1st Cir. 1985); *Donovan v. Bel-loc Diner, Inc.*, 780 F.2d 1113 (4th Cir. 1985); *Soler v. G. & U, Inc.*, 628 F. Supp. 720, 723-24 & n.3 (S.D.N.Y. 1986); *Brock v. El Paso Natural Gas Co.*, 644 F. Supp. 1202, 1208-09 (W.D. Tex. 1986).

[3] If an employer could escape the "reckless disregard" standard solely by obtaining a green light from its lawyers, it would be far

complied with this duty by seeking legal advice and consulting with the Union in an effort to conform its retirement policy to the ADEA. 105 S.Ct. at 625. In contrast, General Motors chose to ignore clear signs that its practices were illegal.[4] A violation rises to the level of reck-

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too easy for a defendant to circumvent the requirements of the Act. *Cf. Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1141-42 (5th Cir. 1972). It seems that the better law would require, at a minimum, good faith reliance on a colorable legal position. *See, e.g., Whitfield v. City of Knoxville*, 756 F.2d 455, 463-64 (6th Cir. 1985) (violation not willful where case law unsettled and defendants rely upon a minority district court opinion); *E.E.O.C. v. Westinghouse Electric Corp.*, 646 F. Supp. 555, 563 (D.N.J. 1986) (violation not willful when the United States government maintains policies similar to those of the defendants); *cf. Thurston*, 105 S.Ct. at 620 (summary judgment by district court in favor of defendants). Unfortunately, the case law interpreting "willfulness" under the *Thurston* definition defies any overarching legal analysis. *Compare Dreyer v. ARCO Chemical Co.*, 801 F.2d 651, 657-58 (3rd Cir. 1986) (willful conduct involves element of outrage); *Berndt v. Kaiser Aluminum & Chemical Sales, Inc.*, 604 F. Supp. 962, 967 (E.D. Pa. 1985) (no "willfulness" where management reviews discharges implicating the ADEA) *to Guthrie v. J.C. Penney Co., Inc.*, 803 F.2d 202, 209 (5th Cir. 1986) (evidence of undue pressure on plaintiff and early retirement policy supports a finding of willfulness); *Galvan v. Bexar County*, 785 F.2d 1298, 1307 (5th Cir. 1986) *reh'g denied* 790 F.2d 890 (1986) (age discrimination willful where age was the explicit reason for not rehiring employee); *E.E.O.C. v. Great Atlantic and Pacific Tea Co.*, 618 F. Supp. 115, 118 (D.C. Ohio 1985) (ADEA violation willful when denial of severance pay was "deliberate, voluntary, and intentional."); *Slenkamp v. Borough of Brentwood*, 603 F. Supp. 1298, 1302 (W.D. Pa. 1985) (material issue as to recklessness where employer posted no signs informing employees of their rights under the ADEA); *Elbe v. Wausau Hospital Center*, 606 F. Supp. 1491, 1499 (W.D. Wisc. 1985) (conduct willful when there is a conscious decision to terminate plaintiff).

[4] General Motors asserts that its officials acted pursuant to a "transfer pay policy." *Compare Thurston*, 105 S. Ct. 613 (1985) (good faith implementation of a facially neutral employment policy). This court has found, however, that the company never adopted such a policy. What General Motors characterizes as a

less disregard when an employer has the resources to conform its conduct to the law, but declines to make the effort.[5] *See, e.g., E.E.O.C. v. Westinghouse Electric Corp.*, 632 F. Supp. 343, 372 (E.D.Pa. 1986); *Slider v. National Rollings Mills, Inc.*, No. 83-5929, slip op. (E.D.Pa. June 9, 1986); *Gorman v. Continental Can Co.*, No. 76-C-908, slip op. (N.D. Ill. March 25, 1986); *Jennings v. Lenox Hill Hospital*, No. 84-1081, slip op. (S.D.N.Y. January 22, 1986). This court finds that General Motors' conduct falls within both the *Thurston* and *Jiffy June* definitions of willfulness.

2. *Computation of Damages*—Both parties have submitted computations of the sums required to compensate the plaintiffs in accordance with the findings and conclusions expressed in the July 10 Opinion and Order. These figures are close and the parties have stipulated that they would "split the difference." The court therefore finds that the plaintiffs were undercompensated during the period beginning three years prior to the filing of suit and ending on the date of trial in the following amounts:

Sheila Ann Glenn	$12,499.46
Patricia F. Johns	$17,267.17
Robbie Nugent	$21,897.29

3. *Prejudgment Interest*—Whether or not liquidated damages are awarded, binding precedent in this circuit precludes the award of prejudgment interest. *See Bar-*

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corporate policy was not a policy at all, but the practice of individual decisionmakers.

[5] As an explanation for its conduct during settlement negotiations, General Motors has brought to this court's attention its policy of obtaining the resignation of employees who file discrimination claims as a condition precedent to settlement. This court feels obliged to point out that a policy of retaliatory discharge may be *per se* "willful" under *Thurston*. *See Powell v. Rockwell International Corp.*, 788 F.2d 279, 286 & n.6 (5th Cir. 1986).

cellona v. Tiffany English Pub, 597 F.2d 464, 469 (5th Cir. 1979); *Foremost Dairies, Inc. v. Ivey*, 204 F.2d 186 (5th Cir. 1953). Liquidated damages, if allowed, act as compensation for delay in the payment of sums due under the Act. *Id.* at 190.

4. *Liquidated Damages*—The court finds that individual company officials held a good faith belief that General Motors had adopted a "transfer pay policy." In the July 10, 1986 Opinion and Order, the court concluded that such a finding was sufficient to establish a good faith defense, making an award of liquidated damages discretionary under 29 U.S.C. § 260. A further review of the case law in this circuit, however, has convinced the court that it applied the incorrect legal standard in reaching this result.

The purpose of a liquidated damages award is to encourage employers to make a good faith effort to ascertain and comply with the law. *Archambault v. United Computing Systems, Inc.*, 786 F.2d 1507, 1514 (11th Cir. 1986). Accordingly, "good faith requires some duty to investigate potential liability under the FLSA."[6] *Washington v. Miller*, 721 F.2d 797, 804 (11th Cir. 1983); *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468-69 (11th Cir. 1979). The Eleventh Circuit has taken a strict view: the good faith defense applies only when an employer innocently and to his detriment follows the law "as it was laid down to him by government agencies, without notice that such interpretations were claimed to be erroneous or invalid." *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1579 (11th Cir.) *modified on other grounds*, 776 F.2d 265 (1985). *Accord E.E.O.C. v. Home Insurance Co.*, 672 F.2d 252, 263 (2d Cir. 1982); *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 661 (4th Cir. 1969).

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[6] In *Thurston*, the Supreme Court fashioned its definition of "willfulness" to reflect these same concerns. 105 S. Ct. at 625 n.22.

General Motors argues that an employer sustains its burden of proof under section 260 by demonstrating a reasonable, albeit mistaken, belief that it was not violating the act. *See, e.g., Walton v. United Consumers Club, Inc.*, 786 F.2d 303; 312 (7th Cir. 1986); *Claymore v. Far-Mar-Co.*, 709 F.2d 499, 505 (8th Cir. 1983); *Martinez v. Food City, Inc.*, 658 F.2d 369, 376 (5th Cir. Unit A 1981). Even under this less exacting standard, ignorance cannot form the basis for a reasonable belief.[7] *See, e.g., Doty v. Elias*, 733 F.2d 720, 726 (10th Cir. 1984); *Marshall v. Brunner*, 668 F.2d 748, 753 (3rd Cir. 1982); *Brock v. El Paso Natural Gas Co.*, 644 F. Supp. 1202, 1209 (W.D.Tex. 1986). There is no credible evidence that General Motors made any attempt to investigate its responsibilities. *See Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726, 730 (10th Cir. 1984); *Melanson v. Rantoul*, 536 F. Supp. 271, 293 (D.R.I. 1982). General Motors has adduced neither case law nor administrative rulings to demonstrate that there were reasonable grounds to support a belief that its acts were in conformity with the law.[8] "A good heart but an empty head does not produce a defense." *Walton v. United Consumers Club, Inc.*, 786 F.2d at 312. The court concludes that it has no choice but to award liquidated damages.

II. ATTORNEY FEES AGAINST GENERAL MOTORS

The court has given detailed consideration to the twelve factors set forth in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-719 (5th Cir. 1974). A more useful starting point for determining a reasonable attorney fee

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[7] A reasonable belief also cannot be based on a simple misunderstanding of the requirements of the Act. *Crenshaw v. Quarles Drilling Corp.*, 798 F.2d at 1351.

[8] General Motors has cited decisions which advance the hardly earthshaking proposition that a corporate policy can be lawful if based on a factor other than sex. In fact, General Motors could not have relied upon these cases because there was no transfer policy.

under more recent law, however, seems to be the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Pennsylvania v. Delaware County Citizens' Council For Clear Air*, 106 S. Ct. 3088, 3097 (1986); *Hensley v. Eckerhardt*, 461 U.S. 424, 433 (1983). The Supreme Court appears to recognize a strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a reasonable fee. *Delaware County Citizens' Council For Clean Air*, 106 S. Ct. at 3097; *Blum v. Stenson*, 465 U.S. 886, 897 (1984). This calculation may subsume many of the twelve factors set out in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974). *See Delaware County Citizens' Council For Clean Air*, 106 S. Ct. at 3098; *Blum*, 465 U.S. at 896-900; *Hensley*, 461 U.S. at 434 n.9; *Jones v. Central Soya Co.*, 748 F.2d 586, 589 (11th Cir. 1984); *United States v. Cert. Real Prop. Loc. at 4880 S.E. Dixie Highway*, 628 F. Supp. 1467, 1472 (S.D. Fla. 1986).

1. *Reasonable Hours*

The court must exclude from its initial fee calculation hours that are not "reasonably expended." *Hensley*, 103 S. Ct. at 1939 (citing S. Rep. No. 94-1011, p.6 (1976)). Plaintiffs' attorneys seek compensation for a total of 1889.1 attorney hours and 411 paralegal and law clerk hours. The reasonableness of this time and labor has been assessed in light of two other *Johnson* factors—the novelty and difficulty of the case and the result. *See Erkins v. Bryan*, 785 F.2d 1538, 1545 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 455 (1986); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1137 (11th Cir. 1984) *York v. Alabama State Board of Education*, 631 F. Supp. 78, 83 (M.D. Ala. 1986).

This case was a routine disparate treatment case, although it may not have been the type of case plaintiffs' counsel ordinarily encounters. Such novel issues as there

were did not present significant legal and factual hurdles. On the other hand, the court notes that plaintiffs' counsel obtained substantial benefits for their clients. When only the interests of the named plaintiffs are at stake, plaintiffs' attorneys should have in mind the actual amount in controversy, and this court would normally balk at awarding fees substantially in excess of that amount. *See Jones v. Central Soya Co., Inc.*, 748 F.2d 586, 591 (11th Cir. 1984). In the present case, however, the plaintiffs' recovery may benefit other female employees who have been adversely affected by General Motors' discriminatory practices. *See City of Riverside v. Rivera*, 106 S. Ct. 2686, 2694, 2700 (1986) (Brennan plurality) (Powell concurrence) (rejecting argument that "fee awards under section 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers").[9]

Notwithstanding possible benefit to other female employees, the number of hours for which plaintiffs claim compensation is clearly unreasonable. The court has no doubt that plaintiffs' attorneys worked more hours than they actually claim. The actual figure exceeds 2300 hours. Even defendant's counsel has billed for substantially over a thousand hours. In contrast, defendant's expert witness, James P. Alexander, testified that the maximum amount of time that is reasonable for litigating this type of case would be approximately 625 hours.

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[9] The plaintiffs were successful in all significant issues except their harassment claim. This claim was relatively insignificant and involved discrete issues of fact and law. *Compare City of Riverside*, 106 S. Ct. at 2692; *Hensley*, 461 U.S. at 435. "A fee applicant should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *City of Riverside*, 106 S. Ct. at 2692; *Hensley*, 103 S. Ct. at 1941. Plaintiffs' records do not lend themselves to a determination of the time devoted to this losing issue. Nevertheless, the court credits Mr. Richardson's testimony that his firm spent no more than 40 hours pursuing this harassment claim.

Under ordinary circumstances, the court would consider 625 hours as an absolute maximum, even if the case were hard-fought and vigorously contested.

Several factors contributed to this staggering waste of legal resources. First, plaintiffs' counsel simply over-prepared, using three lawyers where one would suffice and expending twice the time on memoranda and briefs as was reasonably necessary. *See Jones v. Central Soya Company, Inc.*, 748 F.2d 586, 594 (11th Cir. 1984). Counsel for the prevailing party must make a good-faith effort to exclude such excessive and redundant hours from a fee request just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission. *See Hensley*, 103 S. Ct. at 1939-40; *Erkins v. Bryan*, 785 F.2d 1538, 1545 (11th Cir. 1986). More significantly, the relations between opposing attorneys in this case often degenerated into an acrimonious bickering context which proved to be enormously time-consuming.

General Motors' defense techniques also occasioned a great deal of extra work. General Motors has been stubbornly litigious and has adopted an obstructionist policy in responding to discovery. If General Motors had made a straightforward presentation of its claimed defense and willingly disgorged the information sought by the plaintiffs, this case should have consumed no more than the 625 hours to which reference has been made. At every step of the way, however, General Motors has fully participated in the quibbing that has become the hallmark of this case. Two additional actions by General Motors are relevant.

First, General Motors now states that its standard practice is not to settle any discrimination case unless the complaining employee resigns. This position, the apparently nonnegotiable character of which was only recently revealed to the court, made settlement all but

impossible. Nevertheless, General Motors continued to assure the court of its interest in negotiations and the court continued to pressure both sides to reach a settlement. Plaintiffs' counsel, who had been told that plaintiffs' resignation was essential to settlement, responded by embarking upon an expensive, time-consuming evaluation of the economic loss that plaintiffs would suffer as a consequence of resigning. The court finds that, under the circumstances, these undertakings were reasonable and necessary.

General Motors also injected needless work and expense into this case by adopting an "afterthought" defense. Specifically, General Motors contended that the plaintiffs were not entitled to as much compensation as certain male employees because these male employees utilized an additional skill, namely, working with blue prints. This clearly had no causal relationship with General Motors' discrimination against the plaintiffs. Although this contention was lacking in factual merit, it demanded a response. Plaintiffs' rebuttal required substantial discovery and expensive expert assistance. A defendant has the right to put on its case as it sees fit. This court does not criticize General Motors for exercising this right and its disposition is in no respect punitive.[10] General Motors, however, cannot complain of the waste of time

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[10] At the conclusion of the evidence the court solicited post-hearing memoranda. At that time, it stated its tentative, non-binding, impressions. Defendant takes strenuous exception to certain of the court's remarks. These comments were deliberately couched in provocative terms in a successful effort to elicit pointed memoranda. Counsel has made an unfortunate misconstruction of those remarks, however, if they were perceived as reflecting any punitive disposition by the court. The misunderstood point is simply that defendants' own actions, in the two particulars discussed above, justified and indeed necessitated the expenditure of a great deal more time and money by plaintiffs' counsel than would otherwise have been reasonable. This substantial expense must be borne by defendant.

and resources precipitated by its own strategy. *See Hudson v. Deyton*, 770 F.2d 1558, 1575 (11th Cir. 1985), *reh'g denied*, 777 F.2d 704 (1985).

After considering all these facts and circumstances, the court concludes that 1200 hours was a reasonable expenditure of time by plaintiffs' counsel through the time of trial and to the present date. In disallowing a substantial portion of the hours expended, the court is aware of the desirability of making specific determinations with respect to each disallowed time segment. Unfortunately that is not possible in this case. The only specific item that can be so treated is the 40 hours spent on preparing the unsuccessful harassment claim. The remainder of the disallowance falls into a general category of counsel's simply exceeding the maximum number of hours that could ever be reasonable in this situation. The evidence supporting the fee application does not provide information necessary to a specific breakdown of such items as unnecessary preparation, uses of excessive personnel, and time spent in needless bickering. Nevertheless, the court is reasonably satisfied that, of the total hours expended, 1200, but no more than 1200, were reasonable under the attendant circumstances.

Plaintiffs' fee application also seeks payment for 411 hours worked by paralegals and law clerks. Some of these hours were actually attorney hours that counsel voluntarily downgraded in the application. The court finds that this number is also excessive and will limit this expense to compensation for 200 hours. This will reduce plaintiffs' reimburseable expenses by $7385.00

2. *Prevailing Market Rate*

In determining the prevailing market rate, the court has considered the following *Johnson* factors: customary fee awards in similar cases; skill required to perform the legal services properly; the experience, reputation and ability of the attorneys; the contingent nature of

the fee; undesirability of the case; time limitations; preclusion of other employment; and the nature and length of professional relationship with the clients. *See York v. Alabama State Board of Education*, 631 F. Supp. 78, 84 (M.D. Ala. 1986).

In this district, awards in employment discrimination cases taken on a contingency fee basis range from $90 to $150 per hour. This approximates the customary fee for similar work in this community, which ranges from $90 to $125 per hour. This case required the skill of a competent trial attorney experienced in federal litigation. The firm of Bell, Richardson, Herrington, Sparkman, and Shepard is one of the oldest and best known firms in North Alabama. Insurance companies, railroads and large corporations form the bulk of the firm's clients.[11] As a result, most of the members of the firm lack experience litigating discrimination cases for a plaintiff. Nevertheless, plaintiffs' counsel displayed extraordinary skill and fully anticipated every development at trial.[12] This case would be considered an undesirable one for the Richardson firm: corporate clients do not applaud lawyers who represent employees in discrimina-

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[11] This court is satisfied that the number of hours plaintiffs' counsel reasonably devoted to this case is at least equal to the time expended by the defense counsel. The defendants have not argued that their representation was more involved than the representation of plaintiffs. *See Hudson v. Deyton*, 770 F.2d 1558, 1574 (11th Cir. 1985), *reh'g denied*, 777 F.2d 704 (1985); *Naismith v. Professional Golfers Association*, 85 F.R.D. 552, 563 (1979).

[12] The senior partner, Patrick W. Richardson, one of the attorneys in this case, is a past president of the state bar association and a distinguished leader among the bar of this court. John A. Wilmer, who also worked on this case, practices almost exclusively in the labor field and has had several years experience representing management. James H. Richardson, who acted as lead counsel, routinely handles important matters for his firm. Mr. Richardson displays an ability which belies the fact that he has practiced law for only six years. Gabrielle Wehl has also practiced law for six years; however, she has experience in this type of litigation.

tion actions. In fact, plaintiffs' counsel found it necessary to mollify several of their clients while handling this case.

On the other hand, there is no reason why this case should have taken priority over other cases. Similarly, there is no indication that this case caused plaintiffs' counsel to turn down other work except for the fact that it was so time consuming. The court understands that this is a one-time undertaking by the plaintiffs' counsel and that there is no ongoing professional relationship between the plaintiffs and the Richardson firm.

The court finds that an average hourly fee of $110.00 is reasonable under all of the circumstances presented and that such rate reasonably reflects the prevailing market rate for work performed by similarly situated attorneys in similar employment discrimination cases.[13]

3. *Lodestar Calculation*

The product of the attorneys' compensable time and this average market fee is one hundred thirty-two thousand and no/100 dollars ($132,000.00).[14] The court also awards thirty-four thousand nine hundred seventy-nine and 44/100 dollars ($34,979.44) in expenses, which the courts finds to have been reasonably expended under the circumstances for paralegals, law clerks, fee counsel, general office litigation expenses and expert witnesses.

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[13] Their performance is all the more impressive because defense counsel are among the most highly skilled of Alabama attorneys practicing in this field. Notwithstanding the court's lack of enthusiasm for much that has taken place, defense counsel displayed outstanding ability and a tenacious dedication to their client's cause.

[14] The court would very much prefer to calculate a lodestar figure for each attorney separately. Unfortunately, it is simply impossible to allocate the unsuccessful, unnecessary and redundant hours among the attorneys. For this reason, the court has resorted to an average figure which it finds to be reasonable when the work of all of plaintiffs counsel is considered.

III. *Summary*

Plaintiff Sheila Ann Glenn is entitled to judgment in the amount of twenty-four thousand nine hundred ninety-eight and 91/100 dollars ($24,998.91).

Plaintiff Patricia F. Johns is entitled to judgment in the amount of thirty-four thousand five hundred thirty-four and 33/100 dollars ($34,534.33).

Plaintiff Robbie Nugent is entitled to judgment in the amount of forty-three thousand seven hundred ninety-four and 57/100 dollars ($43,794.57)

Bell, Richardson, Herrington, Sparkman and Shepard, P.A. is entitled to an award of one hundred thirty two thousand dollars ($132,000.00) in fees and thirty four thousand nine hundred seventy nine and 44/100 dollars ($34,979.44) in expenses for their services in representing the plaintiffs.

An appropriate Order will be entered.

DONE this 4th day of February, 1987.

/s/ Robert S. Vance
United States Circuit Judge
Sitting by Designation

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7171

D.C. Docket No. 83-5777

SHEILA ANN GLENN, PATRICIA F. JOHNS
and ROBBIE NUGENT,
Plaintiffs-Appellees,

versus

GENERAL MOTORS CORPORATION,
Defendant-Appellant,

SAGINAW STEERING GEAR DIVISION,
Defendant.

Appeal from the United States District Court for the
Northern District of Alabama

Before JOHNSON and CLARK, Circuit Judges, and DUMBAULD,* Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

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* Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED in part and REVERSED in part; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendant-appellant pay to plaintiffs-appellees 75% of the costs on appeal and that plaintiffs-appellees pay to defendant-appellant 25% of the costs on appeal; said costs to be taxed by the Clerk of this Court.

Entered: April 15, 1988
For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ Warren A. Godfrey

Issued as Mandate: May 12, 1988

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-3

GENERAL MOTORS CORPORATION,
Applicant

v.

SHEILA ANN GLENN, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 13, 1988.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 1st day of July, 1988.

APPENDIX F

1. The Equal Pay Act, 29 U.S.C. § 206(d), provides:

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which

exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

2. Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Sec-

retary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

3. Section 6(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255(a), provides:

> Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—
>
> (a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

4. Section 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260, provides:

> In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had

reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

APPENDIX G

The affiliates and non-wholly owned subsidiaries of Petitioner General Motors Corporation are:

Aralmex, S.A. de C.V. (Mexico);
Automotriz Gencor S.A. (Ecuador);
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador);
Companis Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico);
Compresores Delfa, C.A. (Venezuela);
Convesco Vehicle Sales GmbH (West Germany);
Daewoo Motor Co., Ltd (Korea);
DHB-Componentes Automotives S.A. (Brazil);
Fabrica Columbians de Automotores S.A. ("Colomotores") (Columbia);
General Motors de Columbia S.A. (Columbia);
General Motors Egypt, S.A.E. (Egypt);
General Motors Iran Limited (Iran);
General Motors Kenya Limited (Kenya);
GM Allison Japan Limited (Japan);
GM Fanuc Robotics Corp. (USA);
Industries Mecaniques Meghrebires, S.A. (Tunisia);
Industrija Delova Automobils, Kikinda (Yugoslavia);
Isuzu Motors Limited (Japan);
Isuzu Motors Overseas Distribution Corp. (Japan);
Kabelwerke Reinshagen GmbH (West Germany);
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany);
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany);
Moto Diesel Mexicana, S.A. de C.V. (Mexico);
Motor Enterprises, Inc. (USA);
New United Motor Manufacturing, Inc. (USA);
Omnibus BB Transportes, S.A. (Ecuador);
Promotora de Partes Electronicos Automotrices (Mexico);

P.T. Mesin Isuzu Indonesia (Indonesia);
Senalizacion y Accessorios del Automobil Yorka, S.A. (Spain);
Suzuki Motor Co., Ltd. (Japan);
Unicables, S.A. (Spain).

No. 88-263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION,
Petitioner,

v.

SHEILA ANN GLENN, PATRICIA F. JOHNS AND ROBBIE NUGENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

JUDITH A. MILLER *
ELENI M. CONSTANTINE
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

JAMES H. RICHARDSON
JOHN A. WILMER
GABRIELLE U. WEHL
BELL, RICHARDSON & SPARKMAN, P.A.
116 South Jefferson Street
P.O. Box 2008
Huntsville, Alabama 35804
(205) 533-1421

* Counsel of Record

Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether the trier of fact was clearly erroneous in finding that GM's alleged "transfer policy" did not exist, and that therefore GM failed to prove any affirmative defense to its violation of the Equal Pay Act.

2. Whether the trier of fact was clearly erroneous in determining that GM acted in "reckless disregard" of its obligations under the Equal Pay Act.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 841 F.2d 1567. The opinion of the district court (Pet. App. 20a-49a) is reported at 658 F. Supp. 918.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1988. On July 1, 1988, Justice Kennedy granted an extension of time until August 13, 1988, within which to file the petition for a writ of certiorari. The petition was timely filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

The District Court Case [1]

Plaintiffs, three female "Follow Ups," or inventory clerks, filed this Equal Pay Act suit against General Motors Corporation ("GM") on October 28, 1983, alleging that since 1975, the highest-paid female "Follow Up" had been paid less than the lowest-paid of six male "Follow Ups" at GM's Athens, Alabama, facility. GM argued below that the jobs performed by the male and female "Follow Ups" were different. GM also alleged a sole affirmative defense: that the pay disparity resulted from a "transfer policy" to "encourage employees to transfer from hourly positions to salaried positions by maintaining the same rate of pay after transfer." Pet. App. 28a.

The district court found that the jobs in question were "equal" for purposes of the Equal Pay Act ("the Act")—a finding not challenged now by GM—and held that plaintiffs had proved a prima facie violation. The district court also found that GM's alleged "transfer policy" did not exist, and that therefore GM had violated the Act because GM failed to prove its affirmative defense. The district court further found that GM's conduct showed "reckless disregard" of its obligations under the Act and awarded damages accordingly.

The district court's findings were based on the following facts, adduced at trial and in a second evidentiary hearing. In 1975, plaintiff Robbie Nugent was the first "Follow Up" employed by GM's Materials Management Department for the Athens site. R.4(13).[2] Court Ex. 1

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[1] The trial court's statement of the facts of this case in its combined opinion below, set out in Petitioner's Appendix ("Pet. App.") at 20a-49a, and the court of appeals' affirmance, Pet. App. 1a-19a, are incorporated herein by respondents.

[2] Citations to the record are in the form "R.4(182)," where the first number is that of the volume, the second that of the page cited to.

("Agreed Facts") ¶ 17. She was hired "off the street" (from outside GM) after many years of experience in materials management. Agreed Facts ¶ 16. GM told Mrs. Nugent they would start her at the bottom of the salary scale. Agreed Facts ¶ 18.

Two weeks later, GM hired Richard Tanley. R.4(102); R.5(119). Mr. Tanley was hired expressly for the "Follow Up" position, *id.* but was given the title of "Tool Crib Attendant," an hourly job, and was paid more than Mrs. Nugent. *Id.*; P. Ex. 1b, Attachment III.[3] The undisputed evidence was that Tanley never performed the functions of a "Tool Crib Attendant," but instead worked alongside Mrs. Nugent from the beginning, performing the same work as she. R.4(102); R.5(119). About three months later, Mr. Tanley was "transferred" to the salaried "Follow Up" job, with no change in his responsibilities, according to his own testimony. R.5(120). Not only did he retain his higher pay, but he received an additional 10% raise over Mrs. Nugent for doing the same job. R.5(119-20).

In 1979, GM hired Steve Greenlee "off the street" as a "Follow Up." Agreed Facts ¶ 41. GM gave him a 17.5% wage increase over his prior wages—slotting his salary well above that of Mrs. Nugent.[4] R.5(69); R.6(187-88). Mr. Greenlee worked as a "Follow Up" until 1981, and

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[3] Plaintiffs' Exhibit 1b, Attachment III ("Att. III") is GM's response to plaintiffs' discovery seeking identification of all transfers from hourly to salaried jobs at the facility during the relevant period. *See* note 9, *infra*.

[4] GM asserts that Mr. Greenlee was given a higher starting salary because of his "special skills and expertise." However, GM failed to adduce any evidence, and the trial court certainly did not find, that Mr. Greenlee's alleged "experience" enabled him to perform better than Mrs. Nugent, who had held the "Follow Up" job for four years when Greenlee was hired.

continued to be paid more than Mrs. Nugent at all times. R.5(137-38); P. Am. Ex. 26.[5]

Between 1977 and 1979, forklift driver Stephen Downs, "Job Setter" Harold Wales, and "Tool Crib Attendant" Robert Stephenson transferred from their hourly positions to the salaried "Follow Up" position. Agreed Facts ¶¶ 33, 34 (Downs), ¶ 45 (Wales), ¶ 49 (Stephenson). Each received a discretionary pay increase, Att. III, not set by any policy, practice or formula, but set on a "case-by-case" basis. R.6(125, 216). The result in each case was that the male employee was paid more than Mrs. Nugent. P. Am. Ex. 26.

Plaintiffs Patricia Johns and Sheila Ann Glenn moved into the "Follow Up" position from salaried secretarial positions in 1981. Agreed Facts ¶¶ 21, 24 (Johns), 12 (Glenn). Mrs. Johns' was a "lateral" movement; for Mrs. Glenn, it was a "promotion," entitling her to a pay review which allowed her salary to be placed anywhere in the "Follow Up" scale. R.6(136-38, 189-90). GM chose to slot her salary substantially below the lowest-paid male. P. Am. Ex. 26. In contrast, when male machine operators Billy White and Jerry Pepper transferred from their hourly jobs to "Follow Up" positions in 1977, they received discretionary pay raises over their former hourly rates, putting their pay above the incumbent female "Follow Ups." Agreed Facts ¶¶ 49 (Stephenson), 54 (White); Att. III; P. Am. Ex. 26.

The district court found, and GM does not dispute, that throughout the entire relevant period, GM paid its highest-paid female "Follow Up" less than its lowest-paid male "Follow Up." Pet. App. at 3a, 25a; P. Am. Ex. 26. GM did not plead any merit system defense to explain

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[5] The lower courts' findings credit Plaintiffs' Amended Exhibit 26, attached hereto at Appendix 1a-2a, which graphically charts the pay disparity based on undisputed facts of record. *See* R.5(178-80); Pet. App. at 3a-4a, 21a-25a.

the continuing disparity and the district court certainly did not find any merit system. R.5(151). On the contrary, the evidence was that pay increases in the "Follow Up" job were based on the subjective decisions of individual GM supervisors, *see* Pet. App. 38a n.4, who admitted plaintiffs would have to "out-perform" their male colleagues just to "catch up." R.5(155-56).

Despite repeated complaints from each woman about pay inequities between male and female "Follow Ups," R.4(60, 129, 184); Agreed Facts ¶¶ 136-72,[6] GM gave no pay adjustments until after the EEOC issued a finding of "cause" in response to the women's filing EEOC charges. R.4(55-57, 132, 144-46, 172, 175, 186); R.5 (171-72); P. Am. Ex. 26. GM then gave each plaintiff an "inequity adjustment," a GM pay device designed to equalize pay as management found necessary. P. Ex. 45c, 55c, 66a; R.6(203, 222-23); *see* Agreed Facts ¶¶ 202, 203.[7] Yet GM deliberately decided to raise plaintiffs' pay only to a point that still was well short of equality with the males'. R.6(222, 223); P. Am. Ex. 26. Even with this adjustment, the highest-paid woman still made less than the lowest-paid man. *Id.*[8]

GM's defense was its assertion that the pay disparity resulted from a sex-neutral policy to retain salaries upon transfer from hourly to salaried positions. But a GM list

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[6] Mrs. Nugent had complained about pay differences since 1976 to her supervisors and even to Site Manager Ben Yorks, GM's highest local official. Agreed Facts ¶¶ 47-49. Yet, although Yorks told Mrs. Nugent he would "look into" the reason for her unequal pay, he testified he had not heard of the "transfer policy." P. Ex. 12 at 7, 20. Supervisor Bill Baxter's response to Mrs. Nugent's complaints was that she was lucky to be making more than his wife, who was not a GM employee. R.6(262, 263).

[7] Plaintiffs were told that their "inequity adjustment" was based on a "review of salary structures in the Tool Stores Department." Agreed Facts ¶¶ 205, 206.

[8] After receiving her "inequity adjustment," plaintiff Nugent was denied her scheduled pay increase for that year by her supervisors. R.4(59).

of all hourly employees in the Athens facility who transferred to any non-supervisory salaried job during the relevant time revealed that in fact GM consistently discriminated against women who transferred. Of seven such women, five took pay cuts; but of twenty-two comparable male transferees, twenty-one got raises and only one took a cut. P. Ex. 1b, Attachment III.[9] Charles Hough, GM's Personnel Administrator, also testified that five of seven women who transferred actually had received a pay cut. R.6(138-40); P. Ex. 9a at 80; *but see* R.6(163).

The evidence also established that male "Follow Ups" were allowed to move back into hourly jobs during layoffs and then were re-"transferred" to their salaried positions at even higher pay rates. P. Ex. 74, 101, 102; P. Am. Ex. 26. Robert Stephenson twice came back to his "Follow-Up" job from such a "roll-back" and received a pay increase further distancing his salary from that of the female "Follow Ups." P. Am. Ex. 26. In contrast, women in salaried positions who were moved back into hourly jobs during layoffs were forced to take a pay cut upon "re-transfer" to a salaried position. R.6(87-88).

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[9] In response to plaintiffs' interrogatories, GM produced a list of transfers. That list was admitted at trial as P. Ex. 1b, Attachment III, attached hereto at Appendix 2a-6a. Transfers to supervisory positions listed in P. Ex. 1b, Attachment III are excluded from consideration because salary upon transfer to these positions is governed by a set, written formula, R.6(92, 93), and that transfer policy is not relevant here.

At trial, GM submitted a "corrected" list of transfers, showing only three of seven transferring females as taking cuts on transfer. Plaintiffs vigorously attacked the credibility of this list and its proponent, Hough, who changed his trial testimony from his deposition, in which he identified five of seven women transferees as taking pay cuts. R.6(138-40), (163); P. Ex. 9a at 80.

The district court found that GM's "corrected" list was not persuasive evidence of an alleged sex-neutral "transfer policy"; on the contrary, the court concluded that the alleged policy did not exist. Pet. App. at 28a, 38a n.4, 41a n.8.

GM's own witnesses testified that the "practice" regarding transferring employees was subjective and handled on a "case-by-case" basis. R.6(125, 216). Candidates for transfer were hand-picked by department supervisors. R.6(131). The amount of increase (or decrease) in pay upon transfer was not established by any formula, R.6(125, 129, 130), but was left to the discretion of individual decisionmakers. R.6(129, 217-18); *see* Pet. App. 38a n.4.

GM officials unanimously admitted at trial that the alleged transfer policy was nowhere reduced to writing. R.6(94, 156-60, 195-96). GM did not assert the alleged policy in its Answer, R.1(7), but first asserted it two years later at the Pretrial Conference. R.1(35). The superintendent of the department in which plaintiffs worked refused to call GM's approach to salary setting upon transfer a "policy." R.6(245). As the trial court reasonably expected, R.6(158), GM maintains a written compendium regarding salaried position administration, Agreed Facts ¶ 182, but this "black book" contains no mention of the alleged "transfer policy." *Id.*

GM relies on a 1975 "internal report" it introduced at trial, D. Ex. 2, as evidence of official adoption of the policy; however, the most senior GM official who testified for GM at trial, the Personnel Director for the Saginaw Division, testified the 1975 report was buried "somewhere in the recesses and vaults of the General Motors Corporation," that it "does not exist at the Saginaw Division" and that "very few, if any Salary Administrators ever saw it." R.6(231). The alleged "transfer policy" was unknown both to the work force and top management. P. Ex. 27a at 97-99; P. Ex. 12 at 20; R.5(105-106), R.6(153-54). Although GM supervisors set post-transfer salaries with the concurrence of the personnel department, none of the supervisors who testified were aware of the alleged "policy." R.5(121, 155, 168), R.6(246); P. Ex. 11 at 23.

Under examination by the Court, GM's personnel administrator, Charles Hough, admitted that GM paid female "Follow Ups" less *because women were willing to work for less*:

> THE COURT: Have I correctly understood it that the marketplace more or less dictates what you pay, you pay what it takes to get a good person?
>
> THE WITNESS [Hough]: Yes sir, to a certain extent.
>
> * * * *
>
> THE COURT: All right. Now, let me be fair with you and give you a chance to respond to my concern in that connection.
>
> THE WITNESS [Hough]: Okay.
>
> THE COURT: I think you have to take it as given that it's a fact that in Athens, Alabama and thereabouts women historically have made less than men and it didn't take as much to pay them in the marketplace. I'm understanding you to say that it's General Motors' policy, then, if they are hiring a man and a woman for the same position to pay the man what it takes to get him and pay the woman what it takes to get her, even though it may be substantially less?
>
> THE WITNESS [Hough]: Yes, sir.

R.6(160-61). Hough also admitted that he offered Mr. Greenlee "what it took" to get him to accept the job. R.6(108). Richard Tanley, who had since been promoted to supervisor, testified that the salary of "Follow Ups" was determined by "what it took to get them." R.5(137). GM admitted in discovery that it paid men and women different wages for the same work based on "the free operation of the marketplace." P. Ex. 1b, Answer to Interrogatory 3.

After a careful review of the foregoing and other extensive evidence, R.6(270), the district court made a finding that GM had no "transfer policy." Pet. App. at

28a. Instead, the court found, "GM simply pays Follow Ups what it takes to induce them to accept employment." *Id.* Accordingly, the court concluded, GM had violated the Act.

On the issue of whether GM's conduct showed "reckless disregard" for the Act, key among the evidence summarized above was the 1975 "internal GM report," which contained "a review of potential problems that may be raised by a more thorough examination by the EEOC of GM's compensation policies and procedures." D. Ex. 2 at 1. The report acknowledged that GM's practice of resetting the salary of transferred employees was "more likely" to result in "EEOC-related problems," and to "have an impact from both an EEOC and a Labor-Department-Equal Pay standpoint." *Id.* at 17-19. This report was withheld from plaintiffs during discovery and surfaced for the first time shortly before trial. R.6(230-32).

Mr. Hough and Harvey Krieger, GM's divisional Director of Salaried Personnel, testified for GM that they had conducted an "investigation" in response to the plaintiffs' complaints, that each complaint had been reviewed as it arose, and that the pay disparities were determined to be the result of uniform adherence to GM policies. R.6(106-108, 201-203, 228-29). The trial court found no credibility in this testimony. Pet. App. at 41a.[10] Despite the prior EEOC investigation of plaintiffs' com-

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[10] The district court's rejection of GM's alleged "investigation" was based on pervasive indications of unreliability. Hough's testimony was contradicted by his testimony in deposition two years earlier, before GM articulated its "transfer policy" or "good faith" defenses, that he had never heard of the women's pay complaints until after they filed this suit. P. Ex. 9a at 124. GM's alleged "investigation" offered two explanations for the pay disparity: the alleged "tranfer policy" and an alleged job dissimilarity. R.6(106-108, 201-203, 228-30). But the trial court found that neither explanation had any basis in fact. Pet. App. at 27a-28a, 38a n.4, 41a n.8.

plaints and the resulting determination of "cause," GM's senior labor counsel, Mark Flora, testified that GM asked no attorney, either staff or retained, to render any advice as to the legality of its "policy" or GM's other pay practices in question, until suit was filed. P. Fee Ex. 3 at 17-19.

The district court found on the record evidence that GM had acted with "reckless disregard" for its obligations under the Act. Pet. App. at 37a-39a. The court accordingly held that GM had acted "willfully," [11] triggering the three-year damages period of 29 U.S.C. § 255(a),[12] and that GM had failed to establish a "good faith" defense, mandating the award of liquidated damages. 29 U.S.C. § 216(b).

The Court of Appeals' Holding

GM appealed the district court's finding that the jobs in question were "equal," the district court's rejection of its "factor" defense, the finding of a willful violation, and the award of liquidated damages. The Eleventh Circuit affirmed these findings and conclusions. Pet. App. at 7a. The court of appeals also reversed and remanded for reduction of fees awarded against GM. Neither side has raised those fee issues to this Court.

The court of appeals quoted and affirmed the district court's finding that GM had failed to prove a sex-neutral "transfer policy." Pet. App. at 6a-7a. Citing *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974) and

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[11] The court noted GM's conditioning of settlement discussions on resignation, R.3(74-76), could be considered "willful" per se under *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985). Pet. App. at 39a n.5.

[12] The district court initially found GM's conduct "willful" for statute of limitations purposes, but denied liquidated damages. Pet. App. at 31a-32a. However, after receiving further evidence on the issues of damages and attorney's fees, and holding a second hearing on December 2, 1986, the district court modified its earlier opinion and awarded liquidated damages. Pet. App. at 40a-41a.

cases following it, the court observed that GM's practice of paying women lower wages than men because women were willing to work for less is precisely the evil the Act was designed to eliminate. *Id.* at 7a-8a. The court of appeals noted in dicta that, in its view, an employer's mere alleged reliance on "prior salary" should not in every instance constitute a defense to a proven pay disparity, because "prior salary" can be easily used as a pretext for discriminatory exploitation of the weaker position of women in the marketplace. *Id.* at 9a.

REASONS FOR DENYING THE WRIT

This case turns on its facts. GM seeks yet another review of the district court's finding that GM violated the Act and of the court's award of damages under the Act. But, on this record, the findings of the district court, affirmed by the court of appeals, are clearly correct, and mandate the lower courts' holdings against GM.

The district court's finding that GM violated the Act, and its award of damages under the Act, are the inevitable—and certainly not clearly erroneous—result of the court's thorough review of the wealth of evidence of a blatant, long-standing, unexcused and intentional practice on the part of GM to pay women "Follow Ups" less than men. The district court considered the dramatic evidence of discrimination and GM's failure to prove any sex-neutral policy or practice in justification of its conduct, and came to the necessary and simple conclusion that GM had violated the Act. The district court heard evidence that GM had refused to remedy its discriminatory practices, and that it had refused to investigate its obligations under the Act in the face of an EEOC finding of "cause." The district court rejected as lacking credibility the testimony of GM's officials that GM had conducted a contemporaneous investigation. Pet. App. at 41a. To this compelling evidence of GM's "willful" violation and lack of "good faith," the district

court applied the standard of "reckless disregard" announced by this Court in *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985), and later adopted for actions under the Fair Labor Standards Act, including Equal Pay actions, in *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. 1677 (1988). The district court found that GM evinced "reckless disregard" for its obligations under the Act and awarded damages accordingly. The court of appeals, not surprisingly, affirmed.

There is nothing in this record to warrant this Court's review. As to GM's liability, "The question of whether . . . an employer has sustained its burden of proving one of the exceptions to the Equal Pay Act are factual conclusions subject to the clearly erroneous standard of review." *Maxwell* v. *City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986). Here, the trier of fact found that GM's alleged "transfer policy" did not exist. That finding of the trier of fact, affirmed by the appellate court, is far from clearly erroneous; on the contrary, it is strongly supported by the record. In light of GM's failure to prove that it had any sex-neutral policy to justify the pay disparity proven by plaintiffs, the district court's determination that GM violated the Act was inevitable. As to the damages awarded, this Court just last Term approved the very same "reckless disregard" standard for Equal Pay Act damages that the lower courts applied here, *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. 1677, and the evidence here clearly meets that standard.

There are no issues of law calling for decision here. GM's arguments are based on a record GM clearly wishes it had made below—but did not. As the lower courts held, GM's legal arguments simply lack the necessary factual predicate in this record. The lower courts' holding is dictated by, and confined to, the facts of this case. The petition should accordingly be denied.

I. There Was Ample Basis for the District Court's Finding That There Was No "Transfer Policy"

The district court had before it a wealth of evidence compelling its finding that the alleged transfer policy did not exist. First, the evidence showed that contrary to GM's allegations of a sex-neutral transfer policy, applied non-discriminatorily, of maintaining hourly wages on transfer, the fact was that women at the Athens facility received pay cuts upon transfer from hourly to salaried non-supervisory jobs while men received raises. The practice of resetting the salary of a transferring employee was, moreover, actually used to increase the pay disparity between male and female "Follow-Ups." Mr. Tanley was initially given an hourly title, allowing him to be "transferred" to the "Follow Up" job at a higher salary while doing the same salaried work throughout; Mr. Stephenson was recycled from hourly to salaried positions, raising his wages. GM's treatment of transferring employees was admittedly subjective, and was repeatedly characterized by GM's own management witnesses as handled on a "case-by-case" basis.

The district court found that GM failed to prove it had adopted a sex-neutral "transfer policy," and that instead, salary decisions were left to individual decision-makers. Almost without exception, pay policies at GM are written—but the alleged "transfer policy" was not.[13] Contrary to GM's assertion that the alleged "policy" was a necessary inducement to the hourly work force to move

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[13] Pet. App. at 28a. On appeal, GM argued that the district court required the policy be in writing to qualify as an affirmative defense and that this was error. The Eleventh Circuit rejected this argument, stating: "We do not read the district court's language . . . as relying on the absence of a writing per se. Rather, we read the district court as concluding that the absence of a writing in the context of other written policies provides independent support for its finding that the 'policy' was, in fact, an illegal practice." Pet. App. at 7a n.8. GM's petition raises this "straw man" argument again; it has no basis in the holdings below.

into salaried positions, the work force did not know about the alleged "policy," nor did GM's supervisors. Indeed, the head of plaintiffs' department at the Athens facility refused to testify that there was a "policy."

GM's arbitrary, case-by-case, unpublished practice regarding salaries of transferring employees stands in sharp contrast to well-established Equal Pay Act doctrine, developed in the analogous context of merit or seniority systems, that to constitute an affirmative defense under the Act, an alleged sex-neutral policy must be organized, structured, objective and employ predetermined criteria. *Maxwell* v. *City of Tucson*, 803 F.2d at 447; *Morgado* v. *Birmingham-Jefferson County Civil Defense Corps.*, 706 F.2d 1184, 1188 (11th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984); *E.E.O.C.* v. *Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980); *Brennan* v. *Victoria Bank & Trust Co.*, 493 F.2d 896, 901 (5th Cir. 1974). The existence of the system should be communicated to the employees affected. *E.E.O.C.* v. *Whitin Machine Works, Inc.*, 635 F.2d 1095, 1097 (4th Cir. 1980).

Moreover, even if GM had the "transfer policy" it now describes, such a policy would fail to account for the pay disparity here, and thus would not constitute an adequate defense under the Act. The plain language of the Act prevents an employer from defeating a prima facie claim by proving a "factor" that fails fully to account for the pay disparity. *See e.g.*, *Brock* v. *Georgia Southwestern College*, 765 F.2d 1026, 1037 n.23 (11th Cir. 1985); *Hodgson* v. *Security National Bank*, 460 F.2d 57, 58, 61 and n.7 (8th Cir. 1972); *Marshall* v. *J.C. Penney, Inc.*, 464 F. Supp. 1166, 1181-85 (N.D. Ohio 1979). The alleged "transfer policy" could not account for the fact that two men hired "off the street" for the "Follow-Up" job, Tanley [14] and Greenlee, were

[14] Tanley's hourly title, with no hourly responsibilities, clearly does not affect this analysis: "Application of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance." 29 C.F.R. § 1620.13(e).

paid a higher salary upon entry than that paid to Mrs. Nugent, who had also been hired "off the street." GM did not plead, and the trial court certainly did not find, any other sex-neutral "factor" to account for this disparity. Similarly, GM did not plead nor did the trial court find any sex-neutral "factor" to account for the entry-level salary paid plaintiff Sheila Ann Glenn. Glenn's "bona fide promotion" to the "Follow Up" job allowed her salary to be placed anywhere in the salary scale; yet GM chose to slot her salary below the lowest-paid male "Follow-Up."

More telling yet, the alleged "transfer policy" does not account for the continuing across-the-board pay disparity between male and female "Follow Ups." After the plaintiffs filed EEOC charges and the EEOC found in their favor, each received an "inequity adjustment." GM could have given plaintiffs an "inequity adjustment" to remedy the dramatic and continuing pay disparity at any time, in accordance with company policy. Yet GM chose to take no action until the EEOC found that GM had discriminated against plaintiffs, and even then, GM chose not to bring the plaintiffs' salaries up to that of the lowest-paid man.

The district court and the court of appeals explicitly found that the pay disparity at issue in this case was caused, not by any alleged policy relating to transfers, but by GM's "illegal practice" to "pay 'Follow Ups' what it takes to induce them to accept the employment." Pet. App. at 6a-7a and n.8, 28a, 38a n.4, 41a n.8. The finding that GM pays "what it takes" to hire "Follow Ups" fully accounts for the entry-level pay disparity among male and female "Follow Ups"—including the disparity between males and females both hired "off the street." GM's practice to pay "what it takes" is fully confirmed by the evidence, including the testimony of GM officials. Oddly, GM cites those very findings in asserting that the pay decisions at issue were not based on sex. In so doing,

GM ignores the fundamental intent of the Act: as this Court held in *Corning Glass Works* v. *Brennan*, paying "what it takes" is precisely the exploitation of the "weaker bargaining position of many women" that the Act was designed to correct. 417 U.S. at 206.

In short, the facts of record compel the district court's finding that GM violated the Act. GM seeks to have this Court ignore the overwhelming weight of the evidence below, and substitute GM's arguments for the findings of fact of the district court, affirmed by the court of appeals. The record simply does not present the issue GM wishes it did.

II. This Case Presents No Conflict with Any Court of Appeals Decision

The district court found, and the court of appeals affirmed, that GM's alleged "transfer policy" *did not exist*. Pet. App. at 6a-7a, 28a, 38a n.4, 41a n.8. Despite this clear factual finding and affirmance, GM comes before this Court pretending that it proved such a policy.[15] From that untrue assertion, GM proceeds to argue that the court of appeals held that such a policy could never constitute a defense under the Act, and that such holding (had it existed) would conflict with decisions of other circuits. But GM's legal argument lacks the essential factual foundation.

On page after page of the petition, GM asserts that it has a sex-neutral "transfer policy," which explains the pay disparity. Pet. at 2; *see id.* at 3, 4, 5, 6, 7, 9, 11, 13, 14, 15, 15 n.4, 16, 17, 18, 21, 23, 24, 26. Each of those assertions constitutes a mischaracterization of the record in this case. GM ignores that the trier of fact repeatedly and pointedly found, and the court of appeals affirmed, that the company had no such sex-

[15] In the petition, GM sometimes denominates the alleged "transfer policy" as a "transfer practice"—a sleight-of-hand presumably prompted by the refusal of GM's own management witness to say that GM had a policy.

neutral policy and that the alleged "policy" did not account for the pay disparity proven by plaintiffs.

GM asserts not only that it proved its policy—when it did not—but that its policy is a nationwide standard practice. There is not a shred of evidence in this record to support that assertion. No witness testified as to standard practices of American industry. No one tried to exonerate GM's particular practices other than GM officials. GM did not even argue to the trial or appellate courts that this case involved industry-wide employment procedures.[16] GM premises its argument for certiorari on such unfounded assertions, hoping to put an appealing facade on the less engaging facts of record.

GM argues to this Court, as it argued to the district court, the "hardly earth-shaking proposition that a corporate policy can be lawful if based on a factor other than sex." Pet. App. at 41a. The district court, of course, had no quarrel with that proposition, but found that it had no application to this case—"because there was no transfer policy." *Id.* Despite this ruling, GM argued to the Eleventh Circuit, as it does to this Court, that it had a sex-neutral "pay retention policy."

The court of appeals affirmed the district court's finding that no such policy existed and its holding that therefore GM had violated the Act. Pet. App. at 6a-7a. The court then went on to state that GM's "pay what it takes" practice exemplified the precise type of insidious discrimination that the Act was designed to correct. *Id.* at 7a-9a.

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[16] Amicus Equal Employment Advisory Council, in its prior appellate brief on behalf of GM, mentions alleged practices in various industries that are allegedly similar to GM's alleged "transfer policy." The simple fact, however, is that there is nothing in the trial record to support the EEAC assertions: none of their generalized statements have any evidentiary support whatsoever in this case, and the concerns they address are simply not raised by the record here.

In that context, the court commented in dicta [17] that in its view, an employer's mere invocation of prior salary, without more, should not be a sufficient showing of a non-discriminatory factor because alleged reliance on prior salary can be a pretext for discriminatory exploitation of the weaker position of women in the marketplace. *Id.* at 9a. The court commented that its view was consistent with that of the Ninth Circuit in *Kouba* v. *Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982). *Id.* at 9a.[18] The court further commented, in dicta, that its opinion "may contradict" the Seventh Circuit's opinion in *Covington* v. *Southern Ill. Univ.*, 816 F.2d 317 (7th Cir.), *cert. denied*, 108 S. Ct. 146 (1987).

In fact, *Covington* and this case represent consistent legal analysis applied to radically different facts. In *Covington*, the trier of fact found there *was* a sex-neutral pay retention policy; here, the trier of fact found *there was not.* The Seventh Circuit held that a female assistant professor's low starting salary relative to her male predecessor's was the result of his superior education and experience and the university's *proven* sex-

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[17] These portions of the opinion, on which GM relies, are dicta. The Eleventh Circuit affirmed the district court's finding of fact that GM had not proved a sex-neutral "transfer policy." Pet. App. at 6a-7a. The court of appeals then went on to comment on GM's legal theories based on the unproven alleged policy. *Id.* at 7a-9a. Those comments are classic dicta; they are unnecessary to the court's holding on the facts of this case. They do not create a conflict.

[18] In *Kouba*, the Ninth Circuit reversed the trial court for granting summary judgment without allowing the employer to develop the facts relating to its alleged sex-neutral pay policy, in which prior salary played a part. The Ninth Circuit warned the trial court that "prior salary . . . can easily be used to capitalize on the unfairly low salaries historically paid to women," 691 F.2d at 876. On remand, the trial court entered a consent judgment in favor of plaintiffs, *Kouba* v. *Allstate Ins. Co.*, CVS-77-99 LKK, (E.D. Calif., Sept. 28, 1984)—a fact GM omits to tell this Court.

neutral policy of maintaining the salaries of faculty members who were re-assigned within the university. 816 F.2d at 323-24. Not only did the Seventh Circuit affirm the trial court's finding that the university had a sex-neutral "pay-retention policy," *id.* at 321, but the court of appeals expressly noted that there was no issue of discriminatory practice. *Id.* at 323. Indeed, the Seventh Circuit expressly held that if the policy were discriminatorily applied, or if there were other evidence of sex-based discrimination, or if the entry-level salaries were discriminatorily set, a "pay-retention policy" would not suffice as a defense under the Act. *Id.*

Here, the trial court explicitly found *no* sex-neutral policy and plaintiffs offered substantial and compelling evidence of discriminatory exercise of the discretion vested in "individual decision-makers" to reset salaries upon transfer. Moreover, the telling admissions of Mr. Hough and Mr. Tanley, and GM's admissions in discovery, provided ample basis for the trial court finding that GM exploited the weaker position of women in the labor market. Considering the evidence in this case, it is apparent that the Seventh Circuit would have reached the same result as the Eleventh, had it been confronted with GM's practices.

GM cites to this Court a string of lower court decisions involving proven sex-neutral pay policies. As the district court and the court of appeals held, these cases are inapposite—because GM failed to prove such a policy.[19]

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[19] For example, GM inexplicably seeks to rely on the Fourth Circuit's decision in *E.E.O.C.* v. *Aetna Ins. Co.*, 616 F.2d 719 (4th Cir. 1980). In *Aetna*, the Fourth Circuit approved a merit system, using standards that GM's "case-by-case" practice clearly would not meet:

> Notwithstanding the absence of a writing requirement, a merit 'system' must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria . . . Moreover, to be recognized, it . . .

Simply put, GM has shown no court which would differ from the result below, on the facts of this case. On the other hand, the precedent is legion for the condemnation of both GM's "pay what it takes" practice, and the subjective and unfair salary slotting that led to the illegal pay differentials herein. *See, e.g., Corning Glass Works* v. *Brennan*, 417 U.S. at 209, 210; *Brock* v. *Georgia Southwestern College*, 765 F.2d 1026, 1032 (11th Cir. 1985); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Brennan* v. *Owensboro-Daviess County Hosp.*, 523 F.2d 1013 (6th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976).

In a misguided effort to argue that this decision is nevertheless inconsistent with the intent of the Act, GM has resorted in its arguments to the court of appeals and this Court to comparing its alleged "transfer policy" to the exception for "red-circle rates" recognized in the legislative history and regulations. *See* H.R. Rep. No. 309, 88th Cong. 1st Sess. 3; 29 C.F.R. § 1620.26. In fact, as the Eleventh Circuit noted, comparison of the facts of this case to "red-circling" only emphasizes the absence of a sex-neutral policy in this case. "Red-circle rates," as defined by the legislative sources cited by GM, are "unusual, higher than normal wage rates," H.R. Rep. No. 309, 88th Cong. 1st Sess. 3 (1963), intended for temporary implementation in "special cir-

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must fulfill two additional requirements: the employees must be aware of it; and it must not be based upon sex.

Id. at 725 (citations omitted). Similarly inapposite is *Derouin* v. *Louis Allis Div.*, 618 F. Supp. 221 (E.D. Wis. 1985), which involved a written policy manual, with a formula for setting pay, which was shown to have been implemented in a highly structured and sex-neutral fashion—in stark contrast to GM's arbitrary practice. GM resurrects other clearly irrelevant, largely procedural, decisions such as *Groussman* v. *Respiratory Home Care, Inc.*, 40 Fair Empl. Prac. Cas. (BNA) 122 (C.D. Cal. 1986), which turns on the pro se plaintiff's failure to respond properly to the affidavits supporting summary judgment for the employer.

cumstances," to resolve such short-term problems as that of keeping skilled workers on hand in spite of the employer's present inability to deploy those skills, *id.*, or an employee's inability to perform his regular work. *See* 29 C.F.R. § 1620.26. The legislative history makes clear, and the regulations expressly state, that the "red-circle" principle is only considered a bona fide defense for a "short period." *Id.* In contrast, GM put on no evidence that it transferred any male employee to the "Follow Up" position in order to preserve valuable skills for redeployment later, nor did it allege any other temporary problem which required payment of unequal wages to a few employees for a short period. On the contrary, GM's alleged "transfer policy" purported to justify permanent inequalities in pay and was advanced as an explanation for the fact that from 1975 until suit was filed in 1983, the highest-paid female "Follow Up" was paid less than the lowest-paid male "Follow Up."

GM's "red-circle" argument is a red herring: even if GM had proven its "transfer policy," which it did not, the "red-circle" principle would be inapplicable to this case. A fortiori, since GM failed to prove its "transfer policy," the Eleventh Circuit was clearly correct in concluding that the facts of this case contrasted so clearly with the exceptions envisioned by the legislative history that the result was to support the district court's finding against GM.[20] *See* Pet. App. at 8a-9a.

In summary, GM argues this Court should grant certiorari to determine whether a sex-neutral "pay reten-

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[20] By the questionable insertion of the word "only" in brackets in the language of the Eleventh Circuit opinion, and the removal of the relevant sentence from its context, GM tries to create the impression that the Eleventh Circuit narrowly limited the scope of the "factor" defense. Pet. at 7, 12, 14. The correct quotation, in context, makes clear that the court of appeals simply summarized the legislative history for purposes of comparing the exceptions envisioned therein to GM's inadequate showing of a sex-neutral policy. Pet. App. at 8a-9a.

tion policy" can be a "factor other than sex." But that issue is not presented by this case, because GM failed to prove any sex-neutral "pay retention policy" justified the pay disparity here. The lower courts did not broadly reject "pay retention policies" or "transfer policies" as a "factor" defense; they simply held there was no "pay retention policy" or "transfer policy" proven here.[21] This Court should deny GM's request to address issues not presented by the record.

III. The Record Fully Supports the District Court's Finding That GM Showed "Reckless Disregard" for Its Obligations Under the Act

In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111 (1985), this Court announced a "reckless disregard" test to determine "willfulness" in the context of the liquidated damages provision of the Age Discrimination in Employment Act. 29 U.S.C. § 626(b). Last term, the Court gave plenary consideration to the proper standard for "willfulness" in the context of the Fair Labor Standards Act (including the Equal Pay Act), and also adopted the "reckless disregard" test. *McLaughlin* v. *Richland Shoe Co.*, 108 S. Ct. 1677 (1988). This case presents no reason for the Court again to consider the issue.

At the time of the trial court's decision in this case, the "in the picture" test set out in *Coleman* v. *Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972) was the "law of the circuit." At GM's urging, the trial court applied the more stringent "reckless disregard" standard adopted in *Thurston* —and found that GM's conduct showed "reckless disregard" for its obligations under the Act. Pet. App. at

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[21] Thus, contrary to the arguments of amicus EEAC on appeal, this case does not stand for the sweeping proposition that transfer pay policies may never constitute a "factor other than sex." The lower courts could not reach that issue because no transfer policy was proven.

36a-39a. The court further concluded that the more stringent *Thurston* standard was also applicable to the liquidated damages determination, and revised that portion of its holding to apply that standard in light of the facts adduced at the second hearing. *Id.* at 40a-41a.

GM now urges this Court to take issue with the lower courts' prescient application of the "reckless disregard" standard to the facts of this case. But there is no quesiton that the facts of this case squarely fit the "reckless disregard" test enunciated in *Thurston* and made applicable to the Equal Pay Act in *Richland Shoe.*

That standard is not satisfied merely by a showing of negligent conduct or a "good-faith" but incorrect assumption that a pay plan complied with the Act. 108 S. Ct. at 1682. But the evidence in this case showed GM's intentional disregard for "clear signs that its practices were illegal." Pet. App. at 38a. The undisputed evidence was that GM's top management was aware since 1975 that its practices on transfer and hiring raised Equal Pay problems. Also, top management at the Athens facility knew that these practices had in fact caused a dramatic pay disparity between male and female "Follow Ups." The undisputed evidence was that from 1975 to the date suit was filed, the highest-paid plaintiff made less than the lowest-paid male "Follow Up." The undisputed evidence showed that despite repeated complaints from plaintiffs, GM did nothing to remedy the pay disparity until the EEOC found in plaintiffs' favor. The stipulated facts are that after the EEOC finding of "cause," GM gave each plaintiff an "inequity adjustment"—which it could have given plaintiffs at any time, consistent with company policy—but, in the face of the EEOC determination, intentionally left the highest-paid woman earning less than the lowest-paid man.[22]

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[22] The district court correctly concluded that in light of this overwhelming evidence of refusal to address a known pay disparity, the mere fact that some GM officials may have believed company policy

GM's Senior Labor Counsel testified that GM sought no legal advice regarding its responsibilities under the Act, or the legality of the pay practices affecting plaintiffs, until this suit was filed—despite the EEOC's investigation and adverse determination prior to this suit. GM's failure to investigate its legal obligations or to reform its pay practices in the face of an EEOC finding of discrimination against plaintiffs is further evidence of "reckless disregard" under *Thurston* and *Richland Shoe*.

GM's conduct during the trial itself evinced intentional disdain for its obligations under the Act. GM put on testimony that the district court found to lack credibility, claiming it had conducted a contemporaneous investigation—a tacit admission that GM knew the Act required it to amend its practices. GM's presentation of this misleading testimony to the trial court is further evidence of GM's flagrant reckless disregard for the requirements of the Act and for the authority of the federal courts charged with enforcing it.

On the record, the lower courts had ample evidence to determine that GM's conduct showed "reckless disregard" as this Court has defined that test in *Thurston* and *Richland Shoe*. In doing so, the lower courts applied the correct legal standard. There is no issue for this Court.

This case involves a straightforward application of the Act by the lower courts to remedy precisely the evil Congress sought to abolish: paying women lower wages than men because women are willing to work for less. This factual record fully supports the district court's finding that GM violated the Act and the court's award of damages under the Act. As the district court noted, this is a "routine disparate treatment case," Pet. App. at 42a—a decision dictated by and confined to its facts, presenting no issue worthy of this Court's review.

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authorized their arbitrary and discriminatory increase or decrease of salary on transfer would not prevent a finding that GM acted with "reckless disregard." Pet. App. 40a-41a.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

JUDITH A. MILLER *
ELENI M. CONSTANTINE
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

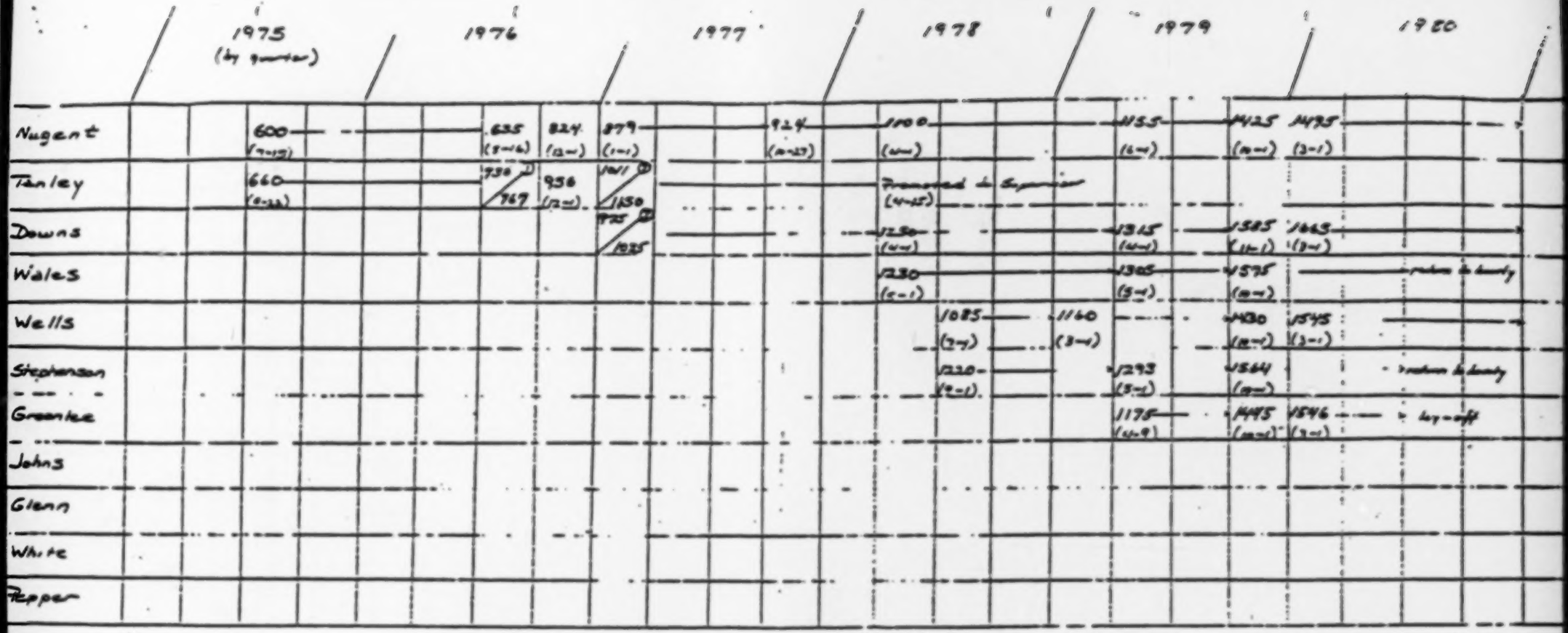
JAMES H. RICHARDSON
JOHN A. WILMER
GABRIELLE U. WEHL
BELL, RICHARDSON & SPARKMAN, P.A.
116 South Jefferson Street
P.O. Box 2008
Huntsville, Alabama 35804
(205) 533-1421

* Counsel of Record

Counsel for Respondents

October, 1988

APPENDIX



Key

- Promote
- Follow Up
- Follow Up

1976

① Pres A, base salary $730.00, 2/16/76;
Brent, base salary $767, 9/16/76.

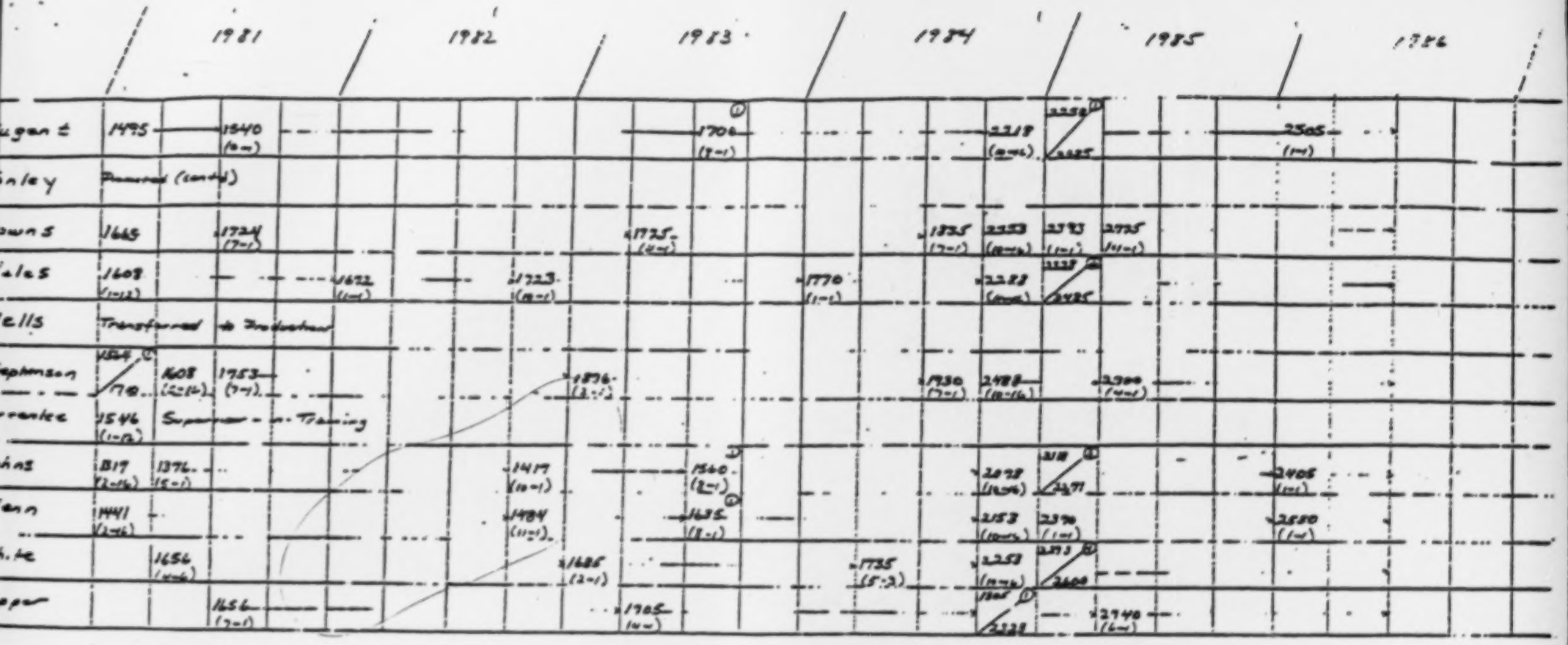
1977

① Other, base salary $1100, 4/1/77;
Brent, base salary $1150, 2/1977

① Prof. Pres., base salary $935, 2/24/77
Brent, base salary $1035, 2/1977

CV-83-V-5777-S

PLAINTIFF'S EXHIBIT 426
Admitted



1981

① Base salary ($1564) upon return from hourly (1-12-81); Ron A to Supervisor-in-training, base salary $1700, 2-16-81.

1983

① Longevity adjustment

1984

① Merit, base salary $1895, 1-1-84; Cola Trans, base salary $2283, 10-16-84

1985

① Cola Trans ($2258) and merit ($2325) effective 1-1-85.

② Cola Trans, $2383, 1-1-85; Merit, base salary $2735, 1-1-85.

③ Cola Trans ($2118) and merit ($2271) effective 1-1-85.

④ Cola Trans, $2293, 1-1-85; Prof Rem, $2600, 3-1-85.

ATTACHMENT III

Name	Address	Sex	Hrly. Rate Before Transf.	Monthly Rate After Transf.	Date Of Transf.	Job Descript After Transf.
Alexander, Carl	P.O. Box 311 Athens, AL 35611	M	11.73(2,032.81)	033.12	7-31-81	Production Supervisor
Allen, Kenneth	Same	M	9.28(1,608,22)	1.710.00	2-1-81	Rec./Shipping Foreman
Berzett, Larry	Same	M	9.73(1,686.21)	1,922.80	11-9-81	Production Supervisor
Blankenship, John	Same	M	11.18(1,937.49)	2,000.00	2-24-81	Production Supervisor
B on, Vance	Same	M	9.56(1,656.75)	1,922.80	6-9-82	Production Supervisor
Boshell, Herbert	Same	M	11.39(1,973.89)	1,973.90	5-18-81	Production Supervisor
Broadway, Billy	Same	M	11.39(1,973.89)	2,000.00	5-18-81	Asso. Tool Trouble Shooter
Brock, Roger	Same	M	7.63(1,322.28)	1,375.00	11-6-78	Supervisor Trainee
Brock, William	Same	M	6.75(1,169.78)	1,710.00	3-16-81	Production Supervisor
Bush, Henry	Same	M	9.03(1,564.90)	1,579.32	4-16-81	Officer—Plant Security
Childers, William	Same	M	5.51(954.88)	1,030.00	7-16-76	Scrap Reduction Coordinator
Cox, Linda	Same	F	9.26(1,604.76)	1,339.92	9-8-80	Officer—Plant Security
C g, Travis	Same	M	5.25(909.83)	1,000.00	11-17-75	Asso. Tool Trouble Shooter
Davis, Thomas	Same	M	9.28(1,608.22)	1,710.00	4-6-81	Production Supervisor
Day, Carolyn	Same	F	7.23(1,252.96)	1,375.00	10-16-78	Supervisor Trainee
Day, Dewey III	Same	M	9.45(1,637.69)	1,637.70	3-16-81	Investigator—Suggestion
Dodd, John	Same	M	8.95(1,551.04)	1,500.00	6-1-78	Supervisor—Production
Downs, Stephen	Same	M	5.38(932.35)	975.00	2-21-77	Asso. Follow Up Tool & Die
Endy, Jerry	Same	M	4.17(722.60)	970.00	7-16-76	Asso. Production Supervisor
Edgemon, Billy	Same	M	3.66(634.28)	970.00	7-16-76	Asso. Inspection Supervisor
Edney, Douglas	Same	M	7.17(1,242.56)	1,200.00	4-1-78	Supervisor—Inspection
Finley, William	Same	M	9.22(1,597.83)	1,600.00	10-16-78	Scrap Reduction Coordinator

Name	Address	Sex	Hrly. Rate Before Transf.	Monthly Rate After Transf.	Date Of Transf.	Job Descript After Transf.
Floyd, Kenneth	Same	M	11.73(2,032.81)	2,093.78	11-9-81	Production Supervisor
Freeman, Horace	Same	M	6.86(1,188.84)	1,280.76	6-16-77	Supervisor—Inspection
Fuller, Harry	Same	M	5.04(873.43)	1,200.00	3-1-77	Asso. Production Supervisor
Gholston, Brenda	Same	F	6.35(1,100.46)	1,040.00	4-25-77	Blue Print Operator
Gilbert, Nelson	Same	M	11.39(1,973.89)	2,033.10	1-12-81	Supervisor—Production
Gilchrist, Jack	Same	M	4.17(722.66)	970.00	2-16-76	Asso. Production Supervisor
Gray, Kenneth	Same	M	5.51(954.88)	1,030.00	7-16-76	Asso. Tool Trouble Shooter
Gray, Willard	Same	M	5.40(935.00)	1,089.16	12-1-76	Asso. Inspection Supervisor
H , Betty	Same	F	3.39(587.49)	585.00	9-20-76	Employment Write-up Clerk
Haley, Timothy	Same	M	7.39(1,280.69)	1,375.00	2-16-79	Supervisor Trainee
Hanners, Douglas	Same	M	11.18(1,937.49)	2,000.00	3-9-81	Asso. Tool Trouble Shooter
Harris, Timothy	Same	M	7.39(1,280.69)	1,375.00	2-16-79	Supervisor Trainee
Haynes, Irene	Same	F	7.23(1,252.96)	950.00	4-16-79	Clerk Typist
Hazel, Jerry	Same	M	9.73(1,686.21)	1,922.80	6-9-82	Production Supervisor
Hembree, Danny	Same	M	7.70(1,334.41)	1,375.00	10-16-78	Supervisor Trainee
Henderson, Gregory	Same	M	8.65(1,499.05)	1,000.00	6-12-78	Foreman Trainee
Hendrix, Jimmy	Same	M	3.76(651.61)	970.00	8-9-76	Asso. Inspection Supervisor
Hester, Harvey	Same	M	9.45(1,637.69)	1,710.00	3-9-81	Supervisor—Production
Hill, Dwight	Same	M	7.39(1,280.69)	1,350.00	2-15-79	Supervisor Trainee
Holder, Charles	Same	M	5.25(909.83)	1,000.00	7-7-75	Supervisor Production Trainee
Holmes, Larry	Same	M	9.56(1,656.75)	1,922.80	8-2-82	Production Supervisor
Howell, Richard	Same	M	6.86(1,188.84)	1,325.00	2-16-78	Rec. & Shipping Foreman
Hudson, Steven	Same	M	7.39(1,280.69)	1,375.00	2-16-79	Supervisor Trainee
Jernigan, Bobby	Same	M	11.39(1,973.89)	2,033.10	1-21-81	Supervisor Production

Johnson, Billy	Same	M	4.17(722.66)	970.00	7-16-76	Asso. Production Supervisor
King, Carolyn F.	Same	F	5.08(880.36)	900.00	3-1-76	Asso. Dispatcher
Kirby, Mikie	Same	M	10.08(1,746.86)	1,980.00	7-28-83	Production Supervisor
Kirby, Wayne	Same	M	7.11(1,232.16)	1,330.00	9-1-77	Supervisor Production
Lambert, Jerry	Same	M	7.32(1,268.56)	1,360.00	3-27-78	Supervisor Production
Lenox, Jimmy	Same	M	8.59(1,488.65)	1,580.00	8-4-77	Supervisor Machine Repair
Le n, Carl	Same	M	5.41(937.55)	1,030.00	7-16-76	Asso. Production Supervisor
Magnusson, Harvey	Same	M	9.79(1,696.61)	1,780.00	2-1-81	Supervisor Production
Martin, Charles	Same	M	7.02(1,216.57)	1,315.00	6-12-78	Foreman Trainee
Maxwell, Cozie	Same	F	6.96(1,206.17)	1,250.00	9-1-77	Asso. Disptacher
McKee, Steven	Same	M	9.28(1,608.22)	1,710.00	4-1-81	Production Supervisor
Mims, Robert	Same	M	7.93(1,374.27)	1,400.00	2-16-79	Supervisor Trainee
Mitchell, Harold	Same	M	10.08(1,746.86)	1,922.80	8-10-82	Production Supervisor
Smith, Thomas	Same	M	5.41(937.55)	1,100.00	1-5-76	Asso. Tool Room Supervisor
Snoddy, Harry	Same	M	5.41(937.55)	1,000.00	1-5-76	Asso. Production Supervisor
Spurlin, Jere	Same	M	7.63(1,322.28)	1,400.00	2-16-79	Supervisor Trainee
Steele, Trillmon	Same	M	5.41(937.55)	1,030.00	7-16-76	Asso. Production Supervisor
Stephenson, Robert	Same	M	6.76(1,171.51)	1,220.00	9-1-78	Asso. Follow-Up Tool & Die
Stephenson, Arthur	Same	M	7.63(1,322.28)	1,375.00	10-16-78	Supervisor Trainee
Stewart, John	Same	M	9.28(1,608.22)	1,612.26	2-24-81	Officer--Plant Security
Stone, James	Same	M	7.09(1,228.70)	1,350.00	2-16-79	Supervisor—Trainee
Stout, Morris	Same	M	7.11(1,232.16)	1,280.76	5-16-77	Supervisor—Inspection
Straub, Theodore	Same	M	7.39(1,280.69)	1,375.00	10-16-78	Supervisor—Trainee
Tanley, J. Richard	Same	M	3.50(606.55)	660.00	9-22-75	Asso. Follow-up Tool & Die
Taylor, Charles	Same	M	8.59(1,488.65)	1,516.00	4-16-77	Scrap Reduction Coor.
Taylor, Mike	Same	M	9.45(1,637.69)	1,612.26	4-16-81	Officer—Plant Security
T r, James Jr.	Same	M	9.56(1,656.75)	1,922.80	5-3-82	Production Supervisor
Terry, Anthony	Same	M	9.63(1,668.88)	1,922.80	6-1-83	Production Supervisor
Terry, Bobby	Same	M	3.30(571.89)	700.00	1-5-76	Asso. Dispatcher

Name	Address	Sex	Hrly. Rate Before Transf.	Monthly Rate After Transf.	Date Of Transf.	Job Descript After Transf.
Thomas, Johnny	Same	M	2.99(518.17)	640.80	2-16-76	Officer—Plant Security
Vassar, Walter	Same	M	9.63(1,668.88)	1,710.00	2-1-81	Rec. & Shipping Foreman
Wagner, Bradford	Same	M	10.08(1,746.86)	1,950.00	11-8-83	Production Supervisor
Wales, Harold	Same	M	7.02(1,216.57)	1,230.00	5-1-78	Asso. Follow Up Tool & Die
Wallace, Jerius	Same	M	7.17(1,242.56)	1,330.00	12-1-77	Supv.—Production
Washco, Gerald	Same	M	9.42(1,632.49)	1,750.00	3-16-81	Production Supervisor
Watkins, Philip	Same	M	7.72(1,337.88)	1,375.00	3-1-77	Asso. Maint. Supervisor
Wheeler, Robert	Same	M	5.41(937.55)	1,030.00	3-1-76	Asso. Tool Trouble Shooter
White, Billy	Same	M	9.28(1,608.22)	1,656.46	4-6-81	Asso. Follow Up Tool & Die
White, Richard	Same	M	9.22(1,597.83)	1,600.00	10-16-78	Supervisor Trainee
Wiley, Ben	Same	M	7.63(1,322.28)	1,375.00	10-16-78	Supervisor Trainee
Woodall, David	Same	M	3.50(606.55)	970.00	7-16-76	Asso. Inspection Supervisor
Wright, Donald	Same	M	5.41(937.55)	1,000.00	2-2-76	Asso. Inspection Supervisor
Wright, Kerry	Same	M	7.07(1,225.23)	1,320.00	12-1-77	Inspection Foreman
Wydner, John	Same	M	9.02(1,563.17)	1,570.00	10-16-78	Supervisor Trainee

No. 88-263

In the Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION, PETITIONER

v.

SHEILA ANN GLENN, PATRICIA F. JOHNS AND ROBBIE NUGENT, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

CHARLES A. POWELL, III
BARRY V. FREDERICK
Powell, Tally & Frederick
Suite 700
New South Federal Bldg.
2100 First Avenue North
Birmingham, AL 35203
(205) 324-4996

KENNETH S. GELLER *
STEPHEN M. SHAPIRO
JAMES D. HOLZHAUER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

DAVID M. DAVIS
MARK R. FLORA
General Motors Corporation
Office of General Counsel
3031 West Grand Boulevard
Detroit, MI 48202
(313) 556-5000

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases:

Statute and regulation:

Miscellaneous:

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---

REPLY BRIEF FOR THE PETITIONER

We demonstrated in the certiorari petition that the Eleventh Circuit has decided an important legal issue under the Equal Pay Act in a way that (a) ignores the language and legislative history of the statute, (b) conflicts with the Seventh Circuit's construction of the Act and with numerous district court rulings, and (c) threatens to disrupt a widespread, sex-neutral employment practice. Remarkably, respondents' brief in opposition makes *no* effort to rebut any of these contentions. Instead, respondents attempt to defend the decision below by falsely alleging that "[t]his case turns on its facts" (Br. in Opp. 11) and by mischaracterizing the court of appeals' indefensible legal rulings as "dicta" (*id.* at 18). This Court should not be misled by this strategy.

1. Respondents attempt to obscure the importance of this case by asserting that it is nothing more than a factual dispute governed by the clearly erroneous rule.

See, *e.g.*, Br. in Opp. 2-10. This implausible assertion can be fully refuted simply by reading the court of appeals' opinion, which makes clear that the court below rejected GM's "factor other than sex" defense for purely legal reasons. Pet. App. 5a-9a. Indeed, the "facts" that respondents state (and frequently misstate [1]) in elaborate

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[1] To give but a few examples of respondents' factual misstatements:

(1) Respondents imply (Br. in Opp. 6) that women who transferred from hourly to salaried jobs or who were allowed to move back and forth between such jobs were treated differently from and worse than men. To the contrary, the record shows that women as well as men retained at least their hourly rate when transferred or re-transferred to salaried positions. See R.6 (164-165); D. Ex. 1 (particularly entries for Linda Cox); GM Court of Appeals Reply Brief at 9-10 & nn.13-14.

(2) Respondents state (Br. in Opp. 17) that "[t]here is not a shred of evidence to support [GM's] assertion" that it followed its transfer pay practice throughout the nation. To the contrary, Harvey Krieger, the most senior national GM manager to testify, stated that GM followed the practice nationally without deviation, and his testimony was not contradicted. R.6 (204-205).

(3) Respondents assert (Br. in Opp. 7) that GM's transfer pay practice was "unknown to * * * top management." To the contrary, the record unequivocally demonstrates that all of the top managers who testified (Krieger, Hough and Baxter) knew of the practice. See R.6 (94, 198, 205, 244-245).

(4) Respondents assert (Br. in Opp. 4) that Sheila Glenn's promotion "entitled [her] to a pay review which allowed her salary to be placed anywhere in the 'Follow Up' scale." To the contrary, the uncontradicted evidence shows that the maximum increase upon promotion was 10%—and that Glenn received the maximum increase. R.6(190); Pet. App. 22a.

(5) Respondents claim (Br. in Opp. 6) that a GM document showed that five of seven women who transferred suffered pay cuts, while only one of 22 transferred men suffered pay cuts. Respondents acknowledge (*id.* at 6 n.9) that the document was later corrected, but they claim that it was corrected "at trial" and imply that the corrections were self-serving. Actually, the corrected document was submitted on May 25, 1985, nearly *a year* before the trial, and it was produced along with payroll records affirming its accuracy. See D. Ex. 1; P. Ex. 2(b) & 3(b); GM Court of Appeals Reply Brief at 6-7. The corrected

detail for the most part were not included in any factual findings of the district court and were not discussed at all by the court of appeals.[2] They certainly were not the basis for the court of appeals' decision.

Respondents try to suggest that GM engaged in "blatant, long-standing and intentional" discrimination on the basis of sex in setting the wages of follow-up workers and that its practices were anything but sex-neutral. See, *e.g.*, Br. in Opp. 11, 15. Unfortunately for respondents, the district court and the court of appeals did not accept these allegations. Thus, contrary to respondents' assertions, neither court below found that GM had no transfer pay practice; rather, both courts referred to GM's treatment of pay following transfer as a "practice" (and that is why GM refers to it as such in its peti-

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document showed that 10 transferred employees suffered pay cuts—8 of them men, all of the cuts small, and all due to clerical errors. Respondents did not offer any evidence to rebut the corrected document and the supporting payroll records.

Respondents compound their misstatement by claiming (Br. in Opp. 6) that Charles Hough testified that five of the seven transferred women suffered pay cuts. That is hardly a fair characterization of Hough's testimony; he testified that the original document showing that five women suffered pay cuts was incorrect and that only two suffered cuts. See R.6 (162-163).

[2] It is interesting that respondents purport to describe "The District Court Case" (Br. in Opp. 2), rather than "The District Court Opinion." Compare Br. in Opp. 10 ("The Court of Appeals' Holding").

Many of the "facts" cited by respondents are entirely irrelevant to the dispute between respondents and GM. For example, respondents make much of the wages that Nugent, Tanley, Greenlee, Stephenson, Downs and Wales received when they first became follow-up workers. Br. in Opp. 3-4. They fail to mention that these events occurred more than three years before respondents commenced these actions and that the statute of limitations thus bars their consideration. Respondents also emphasize the comparison between Tanley and respondent Nugent (Br. in Opp. 3) without mentioning that Tanley left his follow-up job long before the relevant period.

tion). Pet. App. 6a-7a & n.8, 28a.[3] Similarly, the district court specifically held that "GM * * * created the pay disparity concerning [respondents] in good faith believing the disparity justified on the basis of their hourly transfer 'pay policy'" and that the individual company officials who set respondents' salaries also acted in good faith on the basis of what they believed to be valid company policy. Pet. App. 32a, 40a. The court of appeals did not disturb those findings.

Instead, the Eleventh Circuit ruled against GM on the ground that a "salary retention" practice alone could not qualify as a "factor other than sex" under the Equal Pay Act. Pet. App. 8a-9a. Under the court of appeals' holding, an employer who bases a transferred employee's salary on his or her previous salary violates the Act if that practice results in pay differentials between men and women in any job classification. This rule would apply without regard to whether sex discrimination played any part in the employer's decisions (either at the time of initial hiring or at the time of transfer) and without regard to whether the employer's practice had a differential impact on women on a plantwide or company-wide basis. *Ibid.* *That* is the clear basis for the decision below, not—as respondents would revise it—a determination that GM intentionally discriminated on the basis of sex.

2. Respondents next attempt to avoid further review of the Eleventh Circuit's ruling by contending that the passages we quote are merely "dicta." Br. in Opp. 11, 18. According to respondents, the Eleventh Circuit's interpretation of the Equal Pay Act was "unnecessary to the court's holding on the facts of this case" and "do[es] not create a conflict." There are several serious problems with this assertion.

First, respondents' position is contrary to the plain language of the court of appeals' opinion. The Eleventh

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[3] Strangely, respondents accuse GM of "sleight-of-hand" for using the very term ("practice") that both courts below used. Br. in Opp. 16 n.15.

Circuit quite clearly rejected GM's "factor other than sex" defense not because of evidence of actual sex discrimination but because, in the court's words, "[t]he pay disparity at issue here" did not result from "unique characteristics of the same job; from an individual's experience, training or ability; or from special exigent circumstances connected with the business." Pet. App. 8a-9a.[4]

Second, respondents' position is contrary to the court of appeals' contemporaneous characterization of its decision. The Eleventh Circuit correctly "recognize[d] that our *holding* may contradict the Seventh Circuit's holding in *Covington* v. *Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, 108 S. Ct. 146 (1987)." Pet. App. 9a (emphasis added). The court below "reject[ed] *Covington* because it ignores that prior salary alone cannot justify pay disparity." *Ibid.* Although respondents apparently believe that these statements are dicta, the Eleventh Circuit obviously believed that its "holding" was in conflict with the Seventh Circuit's construction of the Equal Pay Act.

Third, respondents' position is contrary to the way in which the Eleventh Circuit continues to characterize the decision in this case. In *Price* v. *Lockheed Space Operations Co.*, No. 87-3574 (11th Cir. Oct. 7, 1988), the court of appeals applied its *Glenn* rule in holding that a company's sex-neutral nondiscriminatory practice of paying skilled employees what they made at their previous jobs was not a "factor other than sex" and would violate the

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[4] Nowhere does the court of appeals say anything to support respondents' bald assertion that it found GM to have engaged in intentional sex discrimination. Indeed, even the district court found that GM's sex-neutral transfer practice, although applied in good faith and in a nondiscriminatory manner, violated the Equal Pay Act only because "historically companies may and do hire women at lower starting salaries" (Pet. App. 28a). There was no evidence in this case that GM set entry-level salaries in a discriminatory manner.

Equal Pay Act if it resulted in a pay disparity between men and women.

In *Price*, the National Aeronautics and Space Administration (NASA) decided to consolidate service operations previously performed by 12 separate contractors into a single contract. The agency expressed concern that the employees who previously did the work for the separate contractors not suffer pay reductions if they were retained by the single contractor.[5] Lockheed (in bidding for the single contract) therefore pledged to pay those employees what they earned in their previous job. When Lockheed was awarded the contract and fulfilled its pledge to NASA, one employee sued, claiming that she was paid less than men performing the same work. In defense, Lockheed claimed that its salary retention practice was a "factor other than sex." The Eleventh Circuit reversed a summary judgment in favor of Lockheed, holding that "[i]n *Glenn* v. *General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988), a panel of this court rejected the very argument [Lockheed] advances here." Slip op. 36.

Thus, the Eleventh Circuit certainly does not regard as "dicta" the legal rulings challenged in the certiorari petition. Instead, it has continued to follow the holding in this case in circumstances that conflict with the decisions of other courts and that are wholly at odds with the language, legislative history and purposes of the Equal Pay Act. Notwithstanding respondents' effort to construct a factbound justification for the judgment in this case based on erroneous "facts" not found or discussed by either court below and citations to passages out of context,[6] the Eleventh Circuit issued a broad and

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[5] In fact, NASA told the contractors that any instances of reduced compensation might be regarded as evidence that the contractor lacked sound business judgment. Slip op. 35.

[6] Respondents' report of the colloquy between Charles Hough and the trial judge is an example of an incomplete passage taken out of context. Hough later testified that GM does not pay women less

general legal ruling that it has already applied in other cases. Respondents' brief amounts to nothing more than a claim that, even if the court of appeals had applied the correct legal rule, they might still have prevailed. Even if that speculation were correct, however—and there is substantial evidence in the record to prove that it is not—GM is still entitled to have the claims against it assessed under the proper legal standard.

3. It is telling, but not surprising, that respondents make no serious effort to defend the court of appeals' construction of the Equal Pay Act. Respondents make no attempt to respond to our contention that Congress and the EEOC plainly contemplated that the "factor other than sex" defense would encompass sex-neutral transfer pay practices similar to the one at issue in this case. Respondents also make no attempt to rebut our submission that thousands of employers throughout the United States utilize transfer pay and other wage retention policies similar to GM's practice. See EEAC Am. Br. 7. Thus, if this Court disagrees with respondents' specious suggestions that the decision below is "fact-bound" or that the Eleventh Circuit's statements are "dicta," respondents have offered absolutely no reason why the Court should not grant review of this plainly erroneous interpretation of an important federal statute.

Respondents do assert (Br. in Opp. 20-21) that GM's comparison of its transfer pay practice to "red-circle" rates is a "red herring" because "red-circle" rates can be regarded as a valid "factor other than sex" only if they

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than men for the same job and that women are not willing to do the same work as men for less money. R.6 (169-171).

By lodging the trial transcript and other documents, respondents apparently believe they can convince the Court to consider "facts" not found by the district court or discussed by the court of appeals and to ignore the critical (and defective) reasoning of the court of appeals. But GM is not challenging any fact findings as clearly erroneous. It is instead challenging the court of appeals' unambiguous legal ruling, and respondents cannot obscure that ruling in a cloud of lodged—but not found—"facts."

are temporary in nature. There is no support for respondents' position. As we pointed out in the petition (at 12), the federal regulation concerning "red-circle" rates gives a specific example that would violate respondents' (and the Eleventh Circuit's) definition: a long-service employee who is transferred to an ordinarily lower-paying job because he is no longer able to perform his previous job. 29 C.F.R. § 1620.26(a). Employers apply "red-circle" rates and other non-temporary salary retention practices for a variety of valid, nondiscriminatory reasons. Pet. 24-26. Respondents' argument (and the Eleventh Circuit's decision) would regard those practices as Equal Pay Act violations even though sex discrimination plays no role in their implementation. Such a radical expansion of the Act should be given close scrutiny by this Court.

4. Relying entirely on authorities dealing with merit or seniority systems, respondents also argue (Br. in Opp. 14) "that to constitute an affirmative defense under the Act, an alleged sex-neutral policy must be organized, structured, objective and employ predetermined criteria." That argument makes no sense. It may very well be that the merit *system* and the seniority *system* defenses (see 29 U.S.C. § 206(d)(1)(i), (ii)) require proof of a structured *system*, but from that it does not follow that the same requirements must be imposed on the "factor other than sex" defense. No court has done so. In fact, in one of the cases relied on by respondents, the court of appeals, while questioning whether the employer's conduct fell within the merit system exception, held that an employer's subjective evaluation that a male employee had greater supervisory and managerial potential was a "factor other than sex." *EEOC* v. *Aetna Ins. Co.*, 616 F.2d 719, 725-726 (4th Cir. 1980). See also H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, *reprinted in* 1963 U.S. Code Cong. & Admin. News 687, 689 (noting that such non-systematic, unstructured factors as differences in training, experience or ability would be factors other than sex.)

5. Finally, respondents make little effort to reconcile the court of appeals' decision with *McLaughlin v. Richland Shoe Co.* 108 S. Ct. 1677 (1988). The Eleventh Circuit's conclusion that GM's conduct met the "reckless disregard" standard simply cannot survive *Richland Shoe*. The district court expressly found that both GM and its officials acted in good faith. See Pet. App. 32a, 40a. The court of appeals, without disturbing those findings, held that GM showed reckless disregard because it relied on a legal theory it should have known to be erroneous. Pet. App. 13a. But in *Richland Shoe*—decided *after* the court of appeals' decision—this Court held that even if an employer acts unreasonably in determining its legal obligations its actions cannot be regarded as willful. 108 S. Ct. at 1682 n.13. To argue that GM acted recklessly because it did not seek legal advice as to the validity of its practice or because it "fail[ed] to investigate its legal obligations" (Br. in Opp. 24) is to ignore *Richland Shoe* and once again to "virtually obliterate[] any distinction between willful and nonwillful violations." 108 S. Ct. at 1681.[7]

Beyond this, although respondents argue that this case "presents no reason for the Court again to consider the [willfulness] issue "(Br. in Opp. 22), they fail to present any reason why the Court should not, at a minimum, remand the case to allow the court of appeals to reconsider that issue in light of the intervening decision in *Richland Shoe*. This is the course that the Court has

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[7] In arguing that GM showed reckless disregard for its obligations under the Equal Pay Act, respondents assert (Br. in Opp. 23) that GM was aware since 1975 that its transfer pay practice violated the Act. It is difficult to reconcile respondents' claim in that regard with its earlier claims that no such practice existed and that GM officials were unaware of the practice! See Br. in Opp. 7, 13-16. Moreover, although Defendants' Exhibit 2, cited by respondents, does state that GM's transfer pay practice might result in pay disparities that some might question on Equal Pay Act grounds, it certainly does not indicate that GM officials believed the practice in fact violated the Act. See D. Ex. 2 at 17-19.

repeatedly followed in identical circumstances. See Pet. 21-22 n.5; *Shirk* v. *McLaughlin*, No. 87-2079 (U.S. Oct. 3, 1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES A. POWELL, III
BARRY V. FREDERICK
Powell, Tally & Frederick
Suite 700
New South Federal Bldg.
2100 First Avenue North
Birmingham, AL 35203
(205) 324-4996

KENNETH S. GELLER *
STEPHEN M. SHAPIRO
JAMES D. HOLZHAUER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

DAVID M. DAVIS
MARK R. FLORA
General Motors Corporation
Office of General Counsel
3031 West Grand Boulevard
Detroit, MI 48202
(313) 556-5000

* *Counsel of Record*

OCTOBER 1988

No. 88-263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION,
Petitioner,

v.

SHEILA ANN GLENN, PATRICIA F. JOHNS and ROBBIE NUGENT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL *
McGUINESS & WILLIAMS
Suite 1200
1015 15th Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Equal Employment Advisory Council (EEAC), with the written consent of the parties, respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari in this case filed by General Motors Corporation.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is an association of employers organized to promote sound practical approaches to equal employment opportunity and

affirmative action. Its membership comprises a broad segment of the private sector business community in the United States, including both individual corporations and trade associations, which themselves have hundreds of employer members interested in the foregoing purposes. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an in-depth understanding of the practical, as well as the legal aspects of equal employment policies and requirements. The members of the Council are firmly committed to the principles of nondiscrimination and equal employment opportunity.

As employers, EEAC's members are subject to the Equal Pay Act, 29 U.S.C. 206, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, both of which involve the "equal work" standard established by the Equal Pay Act, which is the basis of the plaintiffs' suit in the instant case. EEAC participated as amicus curiae in the court below in the instant case pursuant to an order of the Eleventh Circuit granting it leave to do so. EEAC also participated as amicus curiae in *County of Washington v. Gunther*, 452 U.S. 161 (1981), one of the major Supreme Court cases construing the Equal Pay Act, its legislative history and its relationship to Title VII.

Moreover, the instant case involves the Equal Pay Act's affirmative defense which allows differentials in pay to male and female workers for doing equal work if the differential is "based on any other factor other than sex." EEAC filed a brief in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), one of the leading cases construing that defense as it applies to an employer's payment of prior wages.

In its decision below, the Eleventh Circuit held that the "factor other than sex" defense did not apply to GM's sex-neutral policy of not cutting the wages of em-

ployees who transfer to other jobs. Not only is this holding at odds with the Equal Pay Act and its legislative history and numerous other cases, the Eleventh Circuit specifically acknowledged that its holding conflicted directly with the Seventh Circuit's decision in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir.), *cert. denied*, 108 S. Ct. 146 (1987). This conflict is of great concern to EEAC's members, most of which—like GM—are large corporations with facilities in many different federal circuits and who must attempt to ascertain their legal obligations in the face of these conflicting Equal Pay Act interpretations.

As GM points out in its petition, this case involves the common employment practice of maintaining the wages of employees who transfer from higher-paying jobs to lower-paying jobs within the same company. Such wage retention practices are not based on sex, but upon valid business-related reasons. The petition lists a number of legitimate reasons for such policies, including:

> to encourage transfers (particularly to supervisory or salaried positions), to maintain employee morale, to enable minority employees to move into jobs with greater promotional opportunities, to develop a more flexible work force with a greater variety of skills, to retain skilled employees who may be needed in the future, to ease the burden on employees during times of economic contraction, and to accommodate workers who are no longer able to perform in their previous jobs.

(Cert. Pet. at 2).

This Court has recognized that courts and administrative agencies are not permitted to "substitute their judgment" so long as the employer's system "does not discriminate on the basis of sex." *Gunther*, 452 U.S. at 171. The Eleventh Circuit's refusal to recognize GM's wage-retention policy as a legitimate "factor other than sex" is of particular concern inasmuch as implementation of such policies often benefits members of both sexes, and

there has never been any finding in this case that the policy was based on sex. The rejection of the affirmative defense in the face of these facts casts doubt on many compensation systems in effect throughout the private sector, and therefore is of great interest to EEAC.[1]

STATEMENT OF THE CASE

In this action, three female plaintiffs alleged that GM violated the Equal Pay Act, 29 U.S.C. § 206(d)(1), by paying them less than it paid male employees for performing the same jobs. They sought to recover the difference in pay and, alleging that the violation was "willful," to apply a three year statute of limitations and to recover liquidated damages. GM contended that the difference in pay resulted from a "factor other than sex," an absolute defense under the Equal Pay Act. 29 U.S.C. § 206(d)(1)(iv).

The sex neutral "factor" relied upon, and the crux of this case, is GM's longstanding, corporate-wide policy or practice of allowing hourly employees with appropriate skills to transfer voluntarily to salaried supervisory and nonsupervisory positions and to be paid a salary at least equal to their prior hourly rate. (R. 6-197-198; 6-82-83).[2]

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[1] EEAC's ongoing interest in such issues is further demonstrated by its previous participation as amicus curiae in several other cases involving claims of sex-based compensation discrimination. *See, e.g., Florida v. Long*, 108 S.Ct. 2354 (1988); *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983); *American Nurses Ass'n v. State of Illinois*, 783 F.2d 716 (7th Cir. 1986); *AFSCME v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985); *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984); *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); *IUE v. Westinghouse Electric Corp.*, 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 449 U.S. 1009 (1980).

[2] Record (R.) references are to the official record by volume and page. Where reference is to a document, the reference is to volume,

The practice is important to both the employees and management of GM and to employees and employers generally. It allows hourly employees to escape dead-end career paths without a diminution in income (R. 6-207) and encourages the voluntary movement of persons with valuable industrial skills and production experience into supervisory and support positions (R. 5-20; 6-206). These transfers may not be compelled by GM (R. 6-87) under the GM contract with the United Automobile Workers of America ("UAW"). Moreover, in the event of a salaried layoff, former hourly employees may return to hourly jobs. (R. 6-76). Consequently, absent such an income maintenance policy, hourly transfers to salaried jobs would rarely occur. (R. 6-71, 84-85). The income maintenance practice applies to all employees of GM (R. 6-195), including some 18,000 hourly and 3,000 salaried employees of the GM division involved directly in this case. (R. 6-205).

The wage rates for GM hourly employees are established through collective bargaining with the UAW and embodied in a national agreement. Compensation for nonbargaining unit salaried employees is governed by a nationwide "salary administration plan." Neither of the systems was claimed, or found, to be sexually discriminatory. Both systems, and the income maintenance practice, apply in virtually every circuit.

The plaintiffs compared their compensation with that of male employees who, with one exception [3], transferred

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assigned document number and page in the document. "Pet." and "Pet. App." references are to the petition and appendix filed in this Court by General Motors.

[3] The exception was an "outside" hire who had been a vendor of the items he was hired to purchase. He refused to join GM for less money than he was then making. His skills were directly valuable and needed. His hiring was four years after plaintiff Nugent's,

into salaried "followup" jobs from higher paying, hourly production positions governed by the collective bargaining agreement. The plaintiffs had always been under the separate, sex-neutral "salaried employee plan." The court below failed to note that disparities also existed between the plaintiffs' salaries and those of other females who, like the male "followups," had transferred from hourly to salaried jobs.

The Eleventh Circuit affirmed the district court's holding that GM's wage retention policy violated the Equal Pay Act. The court recognized that GM's defense was based on an "unwritten, corporate-wide policy against requiring an employee to take a cut in pay when transferring to salaried positions such as those at issue in the present case." (Pet. App. 6a). But then, citing *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), (Pet. App. 7a), the court mischaracterized GM's defense as the discredited "market force theory."

The court of appeals forthrightly acknowledged that "our holding may contradict the Seventh Circuit's holding in *Covington v. Southern Illinois University* . . . ." (Pet. App. 9a). There, the Seventh Circuit had approved the university's policy of maintaining income levels upon changes of assignment. The Eleventh Circuit stated:

> The flaws of the *Covington* decision are that the Seventh Circuit implicitly used the market force theory to justify the pay disparity and that the Seventh Circuit ignored congressional intent as to what is a "factor other than sex." Consequently, we reject *Covington* because it ignores that prior salary *cannot* justify pay disparity.

(Pet. App. 9a). (Emphasis supplied).

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and two years before Glenn and Johns moved from salaried secretarial positions to "follow up" jobs. (R. 5-71-6-97; 6-108).

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

This case involves an issue of national concern to employees and their employers. The Eleventh Circuit rejected as sexually discriminatory a widely used pay practice which enables employees to move from hourly jobs onto different career paths without economic loss. In condemning the practice at issue, the Eleventh Circuit created a clear analytical conflict with other circuits which have considered similar plans. Indeed, the Eleventh Circuit acknowledged that its decision directly conflicted with the Seventh Circuit's decision in *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir. 1987). In addition, the Eleventh Circuit patently misapplied this Court's decision in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). The Court should review this case to establish uniformity on this issue of national importance.[4]

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[4] Moreover, the Court's ruling as to the applicable statute of limitations is in absolute conflict with this Court's recent decision in *McLaughlin v. Richland Shoe Company, Inc.*, 108 S.Ct. 1677 (1988), which had been argued but not yet decided when the court of appeals ruled. Thus, the Eleventh Circuit has, with this decision, extended the statute of limitations and expanded the liquidated damages provision of the Fair Labor Standards Act by improperly relying on the wholly discredited *Jiffy June* "in the picture" standard. *See Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972). The practical effect of the court's action is to eliminate the two tiered statutory damage scheme of the Fair Labor Standards, Equal Pay, and Age Discrimination in Employment Acts, which the Court has twice preserved in *TWA v. Thurston*, 469 U.S. 111 (1985) and *Richland Shoe*. For the reasons set forth in GM's petition, EEAC urges that the Court grant review of this issue as well.

REASONS FOR GRANTING THE WRIT

THE ANALYSIS EMPLOYED BY THE COURT OF APPEALS IS CONTRARY TO THE STATUTE AND CONFLICTS WITH THE ANALYSIS USED BY THIS COURT AND OTHER COURTS OF APPEALS AND ESSENTIALLY ELIMINATES THE "FACTOR OTHER THAN SEX" DEFENSE FROM THE EQUAL PAY ACT.

A. Other Courts Have Construed The "Factor Other Than Sex" Defense To Cover Income Maintenance Policies Similar To GM's Policy In This Case.

The Eleventh Circuit candidly acknowledged that its decision on the merits is in direct conflict with the Seventh Circuit's *Covington* decision. (Pet. App. 9a). The conflict merits resolution by this Court and goes beyond the patent conflict with the *Covington* result. The more serious conflict is between the method of analysis employed by the Eleventh Circuit and that used by this Court in *Corning Glass Works* and by other circuits which have addressed the issue. The proper analysis, rejected by the Eleventh Circuit, focuses on the legitimacy of the "business purpose" offered as justification for a pay disparity.[5]

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[5] Plaintiffs' case was based upon an alleged violation of the Equal Pay Act, 29 U.S.C. § 206(d). The Act provides in relevant part:

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to . . . (iv) *a differential based on any other factor other than sex* . . . . (Emphasis added).

Section 206(d)(1)(iv) presupposes that a disparity has been established as part of the plaintiffs' prima facie case and provides

By refusing to address the legitimacy of the business reasons offered by GM, the Eleventh Circuit has created confusion and conflict among the circuits. Here, the court did not find that the disparity was because of "sex"; it found only a disparity in income among certain men and certain women in a single job title among the universe of GM jobs. To rule such a disparity unlawful without addressing the business purpose underlying it is contrary to the statute.

"The factor other than sex exception [to the Equal Pay Act] was intended by Congress to be a 'broad general exception.'" *EEOC v. Maricopa County Community College District*, 736 F.2d 510, 514 (9th Cir. 1984), *citing Kouba v. Allstate Insurance Co.*, 691 F.2d 873, 877 (9th Cir. 1982). In *Kouba v. Allstate Insurance Co.*, a closely analogous case, that court of appeals recognized that "a factor used to effectuate some business policy is not prohibited simply because a wage differential results." 691 F.2d at 876.

Contrary to the Eleventh Circuit's holding below, numerous other decisions have recognized the legitimacy of wage maintenance policies adopted for a variety of reasons. This divergence of analysis is most clearly illustrated by *Covington v. Southern Illinois University*, 816 F.2d 317 (7th Cir. 1987), a decision which the Eleventh Circuit candidly acknowledged to be in conflict with its decision in this case. There, the employer paid a male replacement substantially more than the plaintiff for doing the same work. The male had been moved from another job within the University and allowed to retain his higher previous salary based on the university's policy

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"[t]hree specific . . . . and one broad general exception," so that "any discrimination based upon one of these exceptions shall be exempted" from the Act. H.R. Rep. No. 309, 88th Cong., 1st Sess. 3, *reprinted in* Staff of House Comm. on Education and Labor, Legislative History of the Equal Pay Act of 1963, 88th Cong. 1st Sess. 44 (1963).

"that a faculty member's change of assignment does not result in a decrease of salary." 816 F.2d at 319.

The Seventh Circuit rejected the plaintiffs' contention, here accepted by the Eleventh Circuit, that to qualify as a "factor other than sex," an employer's policy or practice must always be related to the requirements of the particular position. Instead, it concluded that:

> . . . SIU's salary retention policy qualified as a factor other than sex. We do not believe that the EPA precludes an employer from implementing a policy aimed at improving employee morale when there is no evidence that the policy is either discriminatorily applied or has a discriminatory effect.

816 F.2d at 322.

The Seventh Circuit also held that in establishing pay rates for transferred employees, the employer may legitimately consider their prior wages. It stated:

> In cases like the one before us, however, in which the wage policy of only the present employer is involved, any presumption of prior discrimination has no place. The present employer should be permitted to consider the wages it paid an employee in another position unless this policy is discriminatorily applied or unless there is evidence independent of the policy which establishes that the employer discriminates on the basis of sex. . . Maintenance of an employee's compensation in a transfer between positions is not in our view unusual and avoids the serious problem of "unmerited" pay reductions.

816 F.2d at 323.

Citing "flaws of the *Covington* decision" (Pet. App. 9a) the Eleventh Circuit rejected its reasoning and refused to approve GM's substantially identical policy.[6]

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[6] While *Covington* involved an intra-employer transfer within a unified salary plan, there is no conceptual distinction from the facts at hand. Here, the transfers were from a formalized hourly plan to a formalized salary plan, all within GM.

As the Seventh Circuit correctly pointed out, income maintenance policies are not "unusual"; indeed, courts have repeatedly found that such policies satisfy the "factor other than sex" defense by focusing on the underlying reasons rather than the result. *See e.g., Grove v. Frostburg National Bank*, 549 F. Supp. 922, 937 (M.Md. 1982) (policy of maintaining income levels when employees were transferred or their job assignments changed was neutral factor applied to all transferees); *Grossman v. Respiratory Home Care, Inc.*, 40 FEP Cases 122 (C.D. Cal. 1986); *Derouin v. Louis Allis Division, Litton Industrial Products, Inc.*, 618 F. Supp. 221, 225 (E.D. Wis. 1984) (employer may legitimately encourage "non-supervisory production employees with high wage rates to apply for supervisory positions without taking pay cuts, rather than having to start at the minimum supervisory rate.").[7]

While acknowledging the conflict with *Covington*, the court of appeals failed to point out that its decision was in direct conflict with many other decisions[8] and with

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[7] Although GM cited these cases to the courts below, neither court mentioned them in deciding either on the merits or in determining GM's asserted policy was "willful" and without reasonable foundation. Notably, the district court ignored these decisions, and also *Kouba v. Allstate*, when it found that GM had "chose[n] to ignore clear signs that its practices were illegal." (Pet. App. 38a).

[8] Other cases approving similar wage retention policies include: *Riordan v. Kempiners*, 831 F.2d 690, 699 (11th Cir. 1987); *Gosa v. Bryce Hospital*, 780 F.2d 917 (11th Cir. 1986); *Ciardella v. Carson City School Dist.*, 671 F.Supp. 699, 701 (D.Nev. 1987); *Blocker v. AT&T Technology Systems*, 666 F.Supp. 209, 214 (M.D.Fla. 1987) (Policy not based on sex and appears reasonable in order to enhance the desirability of employment and to provide security for employees); *Mangiapane v. Adams*, 20 FEP Cases 699 (D.D.C. 1979); *Hodgson v. Lenkurt Electric Co.*, 20 WH Cases 1044 (N.D. Cal. 1972); *EEOC v. Samedan Oil Corp.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,901 (E.D. Okla. 1982); *Adams v. Univ. of Washington*, 722 P.2d 74 (Wash. Sup. Ct. 1986) (permissible to maintain wage rates of skilled employees in economic reorganization in order to mitigate

the clear legislative history of the Equal Pay Act.[9]

Unless this Court requires consideration of the underlying business purpose resulting in income disparities, lower federal courts will continue to be faced with con-

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effects of demoralizing wage adjustment during reassignment of job functions) *See, e.g., EEOC v. Aetna Insurance Co.*, 616 F.2d 719, 724-25 (4th Cir. 1980); *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029-30 (6th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). *See also Hodgson v. Robert Hall Cloths, Inc.*, 473 F.2d 589, 594-96 (3d Cir. 1973), *cert. denied sub nom. Brennan v. Robert Hall Cloths, Inc.*, 414 U.S. 866 (1973).

[9] The Eleventh Circuit's decision below ignores the legislative history of the Act in at least one additional important respect. Both the circuit and district courts ruled below that the "factor other than sex" defense was not available to GM because the income maintenance policy was "not in writing" (Pet. App. 28a), was "merely one aspect of a practice" (Pet. App. 6a, 28a), and "the practice of individual decisionmakers" (Pet. App. 38a-39a, n.4). The legislative history of the Equal Pay Act makes it clear that unwritten practices also qualify for the defense.

A colloquy between Representative Griffin, a principal proponent of the Act, and Representative Fountain explains that point:

> Mr. Fountain: . . . I just wanted to be sure that an employer does not have to have some written or otherwise well-defined system.
>
> Mr. Griffin: I do not think this necessarily means a formal system . . . as long as there is actually a practice or a system that is not based on sex. It may be a practice that has not been reduced to writing.

109 Cong. Rec. 8692 (1963).

An exchange between Representatives Waggoner and Goodell further illustrates the point:

> Mr. Goodell: That [a writing] is obviously not required in order to fit under the exceptions. If . . . there is [a] system or practice . . . based on any factor or factors other than sex, then the system or practice is all right, whether or not it has ever been described in writing.

109 Cong. Rec. 8696-97 (1963).

flicting authorities as to the proper analysis for judging the "factor other than sex" defense, and employers such as GM, whose policies span the circuits, will be placed in an impossible dilemma of having substantial legal support for their policies, yet facing the onus of having to commit a "willful" violation in the Eleventh Circuit if they decide to apply the same pay policies there that they may lawfully maintain in other parts of the country.

If not reversed, the impact of the circuit court's opinion on employment opportunities will be enormous. Employers with income maintenance policies will have to abandon them if they do business in the Eleventh Circuit. The impact will fall heaviest on those employees whose economic position will not allow them to reduce income in order to change career paths.

B. The Court of Appeals Misapplied This Court's *Corning Glass* Decision So As To Improperly Condemn Sex-Neutral, Legitimate Wage Retention Policies.

The Eleventh Circuit simply misapplied this Court's decision in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). The court erroneously stated that GM sought "to defend the pay disparity as a result of the market force theory." (Pet. App. 7a). By using that inapt label rather than *Corning's* analysis, the court twisted the logic of *Corning Glass* to virtually repeal the "factor other than sex" exemption. In doing so, moreover, it created additional conflicts with the decisions of the other courts which have addressed income maintenanance policies.

The "market force" theory was never advanced by GM. This discredited theory posited that women could be paid less "because women were willing to accept lower salaries as they could not command higher salaries elsewhere." *Brock v. Georgia Southwestern College*, 765 F.2d

1026, 1037 (11th Cir. 1985), cited on this point at Pet. App. 7a. As the *Brock* decision correctly explained:

> Indeed, the argument that supply and demand dictates that women *qua* women may be paid less is exactly the kind of evil that the Act was designed to eliminate, and has been rejected. *See Corning Glass Works*, 417 U.S. at 205.

765 F.2d at 1037.

GM instead argued to the Eleventh Circuit that its policy is the antithesis of a sex-based policy paying women less because women will work for less:

> The [district] court did not find, nor was there any evidence that the Salary Administration Plan and the collectively bargained hourly pay plan are other than sex neutral. Male and female salaried employees are subject to the same salary plan and transfer from salaried job to salaried job in the same manner. (R. 6-98). The same is equally true for the hourly system. (R. 6-98-99).
>
> * * * *
>
> [T]he practice was applied in a sex neutral fashion and resulted in hourly females transferring to salaried jobs at incomes higher than both incumbent males (R. 6-99-100) and females (R. 6-100-101). By the same token, men who have transferred from one salaried job to another have found themselves, as did [Sheila] Glenn and [Patricia] Johns, making less than female incumbents who had previously transferred from hourly jobs. (R. 6-100, 102-103).

GM Br. to the Eleventh Circuit at 8-9.

Thus, GM never advanced a "market rate" defense. It followed, and argued that it followed, a sex-neutral practice that resulted in this instance in female follow-up workers being paid less than males in one particular job category. In other instances, as a result of its practice, males in salaried jobs were paid less than females for exactly the same reason.

Indeed, the "market force" theory condemned by *Corning* could not be applied if it were available. In both *Corning* and *Georgia Southwestern* there existed separate male and female "markets" from which the employer could choose. In each case, the source markets made labor available at distinct and sexually driven rates. Here, there is a unitary "source" of uniformly compensated hourly paid employees. GM's income maintenance policy is sex neutral and applied across-the-board to both male and female employees. Neither court below found that either the policy itself, or the prior wages, or the salary plan were sexually discriminatory. In light of the evidence, those findings could not be made. (See Deft. Ex. 1).

The legitimacy of GM's "business policy" and the end it is designed to reach were not considered. Instead, the court erroneously seized upon *Corning* without explanation.

The Eleventh Circuit's misuse of the *Corning Glass* decision confuses the law governing the "factor other than sex defense." The confusion and misapplication is patent. Originally, the Corning plants in question only operated during the day, and "all inspection work was performed by women." 417 U.S. at 190. When night operations began, the male workers assigned to night inspection work demanded and were given a higher wage to perform "demeaning" women's work (417 U.S. at 204). After the Equal Pay Act was passed, Corning equalized the pay for daytime and nighttime inspectors' jobs, but "red circled" the higher wages of male inspectors hired prior to the new collective bargaining agreement, intentionally perpetuating the now-illegal, sex-based differential. 417 U.S. at 194. As this Court noted, focusing on the origin of the disparity:

> The differential arose simply because men would not work at the low rates paid women inspectors, and

> it reflected a job market in which Corning would pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

417 U.S. at 205.

Here, there was no showing, as in *Corning*, that GM's prior rates were the result of unlawful discrimination. The only similarity is that here, and in *Corning*, there was a wage retention policy that resulted in a disparity. That alone proves nothing. The "market theory" factor rejected in *Corning Glass* simply does not aply to the instant case.[10]

Rather than analyze GM's business purpose of encouraging hourly-to-salaried transfers, the Eleventh Circuit focused only on the pay disparity and adopted the convenient but inapt "market force" label of *Corning Glass*. In *Corning Glass* the illegal business purpose was the perpetuation of unlawful, sexually predicated distinctions. No such illegal distinctions have been shown in the instant case. Had the Eleventh Circuit properly utilized the *Corning Glass* analysis, it would have reversed the district court. Instead, it misread *Corning* to create a *per se* violation. The clear misapplication of *Corning*

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[10] Numerous other courts have held that where the income level being preserved is not itself discriminatory, it does not violate the Equal Pay Act to maintain that income when employees are transferred to other jobs for legitimate business reasons. *See e.g.*, *Mangiapane v. Adams*, 20 FEP Cases 699, 700 (D.D.C. 1979) (distinguishing *Corning Glass*); *Covington v. Southern Illinois University*, 816 F.2d at 322 (no violation where prior salary not discriminatory); *Kouba v. Allstate Insurance Co.*, 691 F.2d at 876 (same); *Riordan v. Kempiners*, 831 F.2d 690 (distinguishing *Corning Glass*, where previous classification was itself due to sexual discrimination); and *Derouin v. Louis Allis Div.*, 618 F.Supp. at 225.

Glass makes this case appropriate for Supreme Court review.[11]

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, the amicus respectfully urges This Court to grant the petition herein, issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, and review this case in the manner set forth in the petition of General Motors Corporation.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL *
MCGUINESS & WILLIAMS
Suite 1200
1015 15th Street, N.W.
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae
Equal Employment
Advisory Council

* Counsel of Record

October 17, 1988

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[11] The cases relied on by the Eleventh Circuit are inapposite because they found that the "market theory" cannot be used to justify *sex-based* wage policies. *See Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n.12 (5th Cir. 1973) (wage differential improperly justified on the basis of the tighter market for salesmen and male tailors); *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719, 726 (5th Cir. 1970) (no defense that the employer's bargaining power is "greater with respect to women than with respect to men"); *Brennan v. Victoria Bank and Trust Company*, 493 F.2d 896, 902 (5th Cir. 1974) (no defense that "a woman will work for less than a man"); *Brock v. Georgia Southwestern College*, 765 F.2d at 1037 (no market defense where "those charged with hiring did not inform themselves of the market rates of particular expertise, experience, or skills."). It is clear that GM followed a sex neutral income maintenance policy and so argued to the courts below. "Market theory" cases of this type have no bearing to the facts of this case.

No. 88-263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL MOTORS CORPORATION,
Petitioner,

v.

SHEILA ANN GLENN, PATRICIA F. JOHNS AND ROBBIE NUGENT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JUDITH A. MILLER *
ELENI M. CONSTANTINE
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

JAMES H. RICHARDSON
JOHN A. WILMER
GABRIELLE U. WEHL
BELL, RICHARDSON & SPARKMAN, P.A.
116 South Jefferson Street
P.O. Box 2008
Huntsville, Alabama 35804
(205) 533-1421

* Counsel of Record

Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 22.6 of the Rules of this Court, respondents hereby file this supplemental brief in opposition to the petition for a writ of certiorari, directing the Court's attention to *Price* v. *Lockheed Space Operations Co.*, 856 F.2d 1503 (11th Cir. 1988), attached hereto at Appendix 1a-8a.[1]

In *Price* v. *Lockheed*, Lockheed sought to defend against a claim under the Equal Pay Act ("the Act") by asserting the affirmative defense that the pay disparity between male and female employees was due to the disparate salaries paid to plaintiff Cleotrice Price and her male counterparts by their previous employers. The *Price* court reversed a directed verdict for Lockheed, and

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[1] This opinion was not available to respondents at the time respondents' brief went to the printer.

held that this defense should instead be submitted to the jury. The court cited *Glenn* v. *General Motors Co.*, Pet. App. at 9a-10a, n.9, not in support of eliminating consideration of prior salary as a defense, but to reject Lockheed's argument that "prior salary is *necessarily* a factor other than sex." The Eleventh Circuit stated: "[T]o accept the appellees' argument that prior salary alone is a *per se* factor other than sex would require this Court to contravene Congress' intent and perpetuate the traditionally unequal salaries paid to women for equal work." App. at 6a-7a. (Emphasis added.)

Petitioner's reply asserts that the Court of Appeals for the Eleventh Circuit, in *Price* and *Glenn*, has developed a "radical" doctrine barring any use of prior salary in defense to an Equal Pay Act suit and that *Price* and *Glenn* are confessedly in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Kouba* v. *Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982). Petitioner misleads this Court: contrary to GM's allegations, in both *Price* and *Glenn* the Eleventh Circuit specifically pointed out that its position was consistent with *Kouba*. *Price* v. *Lockheed*, App. at 6a-7a; *Glenn* v. *General Motors*, Pet. App. at 9a. The *Price* court in fact cited *Glenn* simply to make that express point. *Price*, App. at 6a-7a.

The analysis in *Glenn*, *Price* and *Kouba*, recognizing that prior salary may be but is not necessarily a defense, is mandated by both the Act and this Court's opinion in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974). The Act's clear intent—to eradicate wage discrimination caused by the fact that women have historically worked for less—means that an employer cannot justify paying a woman less than a man for equal work simply by asserting he could hire her for less because she was getting less before. That is nevertheless what Lockheed argued as a matter of law in *Price*, and what GM seeks to do here, and the Eleventh Circuit properly rejected that argument on both occasions.

The position of the Courts of Appeals for the Eleventh and Ninth Circuits on the use of prior salary is consistent with the Act because it requires the courts to consider, on a case-by-case basis, whether the employer was using prior salary in a sex-neutral manner for legitimate business reasons. This is evident in *Price*, where the court of appeals reversed the district court's entry of a directed verdict and remanded so that the jury could evaluate what inference to draw from the facts alleged. Contrary to GM's assertions that the Eleventh Circuit holds that prior salary can never be a defense under the Act, the court in *Price* expressly held that Lockheed's prior salary defense could go to the jury, App. at 6a-7a, and thus *preserved* the employer's right to present an affirmative defense based on prior salary.

Contrary to petitioner's arguments, the holdings of the Court of Appeals for the Eleventh Circuit in *Price* and *Glenn* do not create any conflict between circuits, and are consistent with the purposes of the Act.

Respectfully submitted.

JUDITH A. MILLER *
ELENI M. CONSTANTINE
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

JAMES H. RICHARDSON
JOHN A. WILMER
GABRIELLE U. WEHL
BELL, RICHARDSON &
SPARKMAN, P.A.
116 South Jefferson Street
P.O. Box 2008
Huntsville, Alabama 35804
(205) 533-1421
Counsel for Respondents

* Counsel of Record

October 1988

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-3574

CLEATRICE B. PRICE,
Plaintiff-Appellant,

v.

LOCKHEED SPACE OPERATIONS CO., AND
STEVEN KERASOTIS,
Defendants-Appellees.

Oct. 7, 1988

Appeal from the United States District Court
for the Middle District of Florida

Before TJOFLAT, VANCE and COX, Circuit Judges.

COX, Circuit Judge:

Cleatrice B. Price filed suit against Lockheed Space Operations Company (LSOC) and Steven Kerasotis, her employer and its supervisor, alleging discrimination on the basis of sex and race in violation of 29 U.S.C. § 206(d)(1) (1978),[1] 42 U.S.C. § 1981

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[1] The Equal Pay Act provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under

(1981),[2] and 42 U.S.C. §§ 2000e to 2000e-17 (1981).[3] Following the plaintiff's presentation of evidence to the jury, the district court directed a verdict in favor of both defendants. Ms. Price appeals that determination, arguing that she presented substantial evidence from which discriminatory treatment could be inferred, that the district court usurped the traditional function of the jury by judging the credibility of the witnesses presented, and that the defendants' motion for a directed verdict failed to state with sufficient specificity the grounds upon which it was based. We find that the evidence, when viewed in the light most favorable to Ms. Price, was sufficient to present an Equal Pay Act case for the jury's determination. Accordingly, the judgment below is affirmed in part, reversed in part, and remanded for further proceedings.

I. EQUAL PAY ACT

Cleatrice Price became employed as a Publications Writer Senior in the Operations and Maintenance De-

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similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (1978).

[2] "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. § 1981 (1981).

[3] No issues arising from appellant's Title VII claim are presently before this court for review. Any issues which may have been raised were expressly abandoned during oral argument.

partment of LSOC in early January, 1984.[4] Publications Writers at LSOC process Operations and Maintenance Instructions. Specifically, Ms. Price and the other writers in her department drafted step-by-step instructions on the operation of certain equipment and systems necessary to the pre-launch processing of the space shuttles, editing and incorporating changes as suggested by the engineers charged with implementing the instructions. Ms. Price was one of three females in the twenty-five person department, and was the only black. Steven Kerasotis supervised the department.

LSOC initially classified Cleatrice Price in pay grade three[5] and compensated her at the rate of $398.00 per week, the same salary she had received from United States Boosters, Inc., her previous employer. The other twenty-four writers in the Operations and Maintenance Department were classified in higher pay grades under different job titles and were paid greater salaries. During the first nine months of her employment, LSOC increased Ms. Price's pay grade classification to grade four, and raised her salary to $464.00. Although this represented the greatest percentage wage increase and one of the highest actual dollar increases in the department, Ms. Price was still receiving less compensation than twenty-two of her co-writers, twenty of which were male.

Ms. Price challenges the district court's determination that the evidence presented during her case-in-chief was insufficient to fashion an Equal Pay Act case for the jury's consideration. A motion for directed verdict

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[4] Ms. Price was at the time of trial working as a Technical Analyst in the Thermal Protection Systems Engineering Group. In April, 1985, she requested and received a transfer from the Operations and Maintenance Department.

[5] LSOC utilizes a multi-grade classification system as part of its compensation plan. Each grade within the system contains several job titles and a range of salaries.

should be granted only when there can be but one reasonable conclusion as to the verdict. *Dempsey v. Auto Owners Ins. Co.*, 717 F.2d 556, 559 (11th Cir. 1983). In determining whether Ms. Price's evidence was sufficient to withstand the defendants' motion,[6] we have viewed all of the evidence, together with all logical inferences flowing from the evidence, in the light most favorable to Ms. Price. *Boeing Company v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).[7] The credibility of the witnesses was not considered, however; that evaluation is for the jury, not the court. *Neff v. Kehoe*, 708 F.2d 639, 644-45 (11th Cir. 1983).

A. PRIMA FACIE CASE

In order to make out a *prima facie* case under the Equal Pay Act, a plaintiff must demonstrate "that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.' " *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (quoting 29 U.S.C. § 206(d)(1)). This burden is fulfilled by showing discrimination in terms of pay vis-a-vis one employee of the opposite sex. *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1033 n. 10 (11th Cir. 1985). The evidence presented by Ms. Price establishes a *prima facie* Equal Pay Act case, and this is conceded by the defendants.

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[6] The appellant's contention that the motion for directed verdict was vague and ambiguous need not detain us long. Our review of the record leads us to conclude that the motion was specific enough to draw into question the sufficiency of the evidence of sex and race discrimination. It stated with clarity how the plaintiff's evidence was deficient; nothing more is required by Fed.R.Civ.P. 50(a).

[7] This court has adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

B. LSOC'S AFFIRMATIVE DEFENSE

Once the plaintiff has established a *prima facie* case under the Equal Pay Act, the burden shifts to the employer to prove that the difference in pay is justified by one of the four exceptions established by Congress in the Act: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex. *Corning Glass Works*, 417 U.S. at 196, 94 S.Ct. at 2229; *see* 29 U.S.C. § 206(d)(1). These exceptions are affirmative defenses on which the employer bears the burden of proof. *Corning Glass Works*, 417 U.S. at 196, 94 S.Ct. at 2229. LSOC seeks to justify the pay disparity on the fourth defense—a differential based on a factor other than sex.

In 1983, NASA consolidated twelve service contracts for the pre-launch processing of the space shuttles into a single contract, and sought bids for the performance of this unified Shuttle Processing Contract. NASA was concerned that the intensely competitive nature of the bid process would induce bidders to contemplate wage reductions for those employees of the twelve separate contractors that would have to be retained by the successful bidder for performance of the contract. It, therefore, cautioned offerors that instances of lowered compensation might be considered a lack of sound business judgment. LSOC in response pledged that it would not diminish the salaries of incumbent employees. It was LSOC's bid strategy to effectively address NASA's concern, and yet submit the lowest possible bid by paying any incumbent employee hired by it precisely the same salary paid to that employee by the previous employer. LSOC was awarded the Shuttle Processing Contract in September, 1983.

LSOC's compensation plan provided for the gradual elimination of the inevitable inequities that it anticipated would result from the merging of multifarious salary structures. According to the plan, a portion of the funds

set aside for periodic salary adjustments was to be used to correct the resulting inequities. These funds were separate and apart from the portion earmarked for general merit pay increases.

By February, 1984, LSOC had transitioned in all of the employees of the twelve contractors previously involved in the prelaunch processing operation at the same rate of pay they were receiving from LSOC's predecessors, except for a smattering of top level officials and certain critical skills employees. Included among these approximately four thousand incumbent employees was Cleatrice Price, a Technical Writer at United Space Boosters, Inc. Her final weekly salary at United Space Boosters was $398.00; accordingly, she was hired by LSOC as a technical writer and paid a salary of $398.00 per week. This was consistent with LSOC's commitment to NASA.

The appellees answered Ms. Price's complaint by asserting affirmatively that her salary was unequal solely because of the compensation plan mandated by LSOC's commitment to NASA, not her sex. On appeal, their argument in support of the trial court's ruling as it relates to the Equal Pay Act claim is two-fold: (i) the wage structures inherited by LSOC justified the pay disparity since prior salary is necessarily a factor other than sex, *see Kouba v. Allstate Insurance Company*, 691 F.2d 873 (9th Cir. 1982), and, in the alternative, (ii) the undisputed evidence offered to establish the affirmative defense is so compelling that the articulated factor other than sex was proved as a matter of law.

Initially we note that the appellees' reliance on *Kouba* is misplaced. In *Glenn v. General Motors Corp.*, 841 F.2d 1567 (11th Cir. 1988), a panel of this court rejected the very argument that LSOC advances here. *Kouba* does not stand for the proposition that prior salary alone can justify pay disparity. Rather, the Ninth Circuit held that "the Equal Pay Act does not impose a *strict prohibition* against the use of prior salary." An employer will

have violated the Act, according to the *Kouba* Court, if other business reasons do not reasonably explain the utilization of prior salary. *Glenn*, 841 F.2d at 1571 n. 9 (quoting *Kouba*, 691 F.2d at 878 (emphasis added)). Moreover, to accept the appellees argument that prior salary alone is a *per se* factor other than sex would require this court to contravene Congress' intent and perpetuate the traditionally unequal salaries paid to women for equal work. This we refuse to do.

We also reject the appellees' alternative argument; the evidence offered to establish the reason for the wage disparity, though it remained undisputed, was not so compelling that it necessarily rebuts the inference of discrimination raised by Ms. Price's *prima facie* case. Instead, the evidence *in toto* presents two competing inferences, that the appellees discriminated on the basis of sex, and that there existed a reason other than sex for the continuing wage disparity. It is the function of the jury as the traditional finder of facts, and not the court, to resolve the conflict between these competing inferences. *See Boeing Co. v. Shipman*, 411 F.2d at 375.

Moreover, one logical conclusion that could be drawn from the evidence is that LSOC acted too slowly in rectifying the admittedly inequitable salary paid to the plaintiff. Ms. Price maintained this contention as the central theme of her case through her pleadings, the pretrial document, and her opening argument at trial. Although she received salary increases greater than many of her coemployees, the evidence proved that Ms. Price's salary remained less during the fifteen months that she worked in the Operations and Maintenance Department than twenty-two of her colleagues, including four males ranked below her in terms of job performance. When considered in conjunction with the inference of discrimination created by the *prima facie* case, this evidence could reasonably lead a jury to reject LSOC's articulated factor other than sex. Accordingly, Ms. Price was entitled to have the jury decide her Equal Pay Act claim.

II. § 1981

§ 1981 can be violated only by purposeful discrimination. *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 382-91, 102 S. Ct. 3141, 3145-50, 73 L.Ed.2d 835 (1982). The district court held that the plaintiff failed to produce sufficient evidence of racial discrimination, circumstantial or otherwise, to present a genuine issue of fact for the jury's determination. We agree.[8]

Ms. Price sought to meet her burden of showing discriminatory intent solely through evidence of certain statements made by Mr. Kerasotis in response to allegations by Ms. Price of improper racial conduct. Mr. Kerasotis stated during a private meeting with the plaintiff that he had many friends who were black, that some of them had eaten dinner in his home with his family, and that he had been brought up on welfare. These statements, though in part tasteless, are not so egregious that reasonable minds could infer racial animus from them.

III. CONCLUSION

Based on the foregoing analysis and conclusions, the order of the district court granting appellees' motion for directed verdict is REVERSED insofar as it relates to the appellant's Equal Pay Act claim, and REMANDED to the district court for proceedings consistent with this opinion. We AFFIRM the district court's decision in all other respects.

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[8] We pause at this point to summarily reject Ms. Price's contention that the district judge must have resolved issues of credibility against her witnesses since he adopted in large part the arguments proffered by the defendants in support of their directed verdict motion. This assertion, which is relevant only to the § 1981 claim because of our other holdings, is not supported by the record. Indeed, our review of the district court's ruling indicates that the judge's factual findings were based on the evidence precisely as it was presented by the plaintiff's witnesses.